

S. HRG. 113-730

**IMPLEMENTING MAP-21'S PROVISIONS  
TO ACCELERATE PROJECT DELIVERY**

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**HEARING  
BEFORE THE  
COMMITTEE ON  
ENVIRONMENT AND PUBLIC WORKS  
UNITED STATES SENATE**

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

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SEPTEMBER 18, 2013

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Printed for the use of the Committee on Environment and Public Works



Available via the World Wide Web: <http://www.gpo.gov/fdsys>

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U.S. GOVERNMENT PUBLISHING OFFICE

96-021 PDF

WASHINGTON : 2015

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COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ONE HUNDRED THIRTEENTH CONGRESS  
FIRST SESSION

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## **IMPLEMENTING MAP-21'S PROVISIONS TO ACCELERATE PROJECT DELIVERY**

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**WEDNESDAY, SEPTEMBER 18, 2013**

**U.S. SENATE,  
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,  
*Washington, DC.***

The full Committee met, pursuant to notice, at 10 a.m. in room 406, Dirksen Senate Building, Hon. Barbara Boxer (chairman of the full Committee) presiding.

Present: Senators Boxer, Vitter, Inhofe, Barrasso, Cardin, Udall, Whitehouse, and Fischer.

### **OPENING STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM THE STATE OF CALIFORNIA**

Senator BOXER. We are here to conduct oversight on the bipartisan Moving Ahead for Progress in the 21st Century, MAP-21, which President Obama signed into law on July 6th, 2012. The U.S. Department of Transportation is charged with implementing the many policy improvements included in that law, which is expected to save or create nearly 3 million jobs throughout all sectors of the economy.

As the authorizing committee of jurisdiction, we all have a great interest in ensuring that the transformational reforms included in MAP-21 are properly implemented. Senator Udall has expressed concerns and I promised him we would have this hearing to focus on project delivery.

During the development of MAP-21, one of the most common messages we heard was that transportation projects take too long to be completed, years and years and years. Delays in project completion drive up costs while delaying the benefits to travelers and benefits to the environment which will result from a more efficient transportation system. To address these delays, MAP-21 included nearly two dozen provisions addressing project delivery while preserving public health and environmental protections.

It is important to note that transportation projects are delayed for a wide number of reasons, including lack of funding. MAP-21 includes policy reforms that should help all aspects of project delivery from the planning process to early consultation to more efficient and innovative contracting and construction methods. Examples of the key improvements include accelerating Federal agency decisions through the establishment of meaningful deadlines and the use of an effective issue resolution process, promoting early coordination, and I think that is key. I know some agencies don't like it, but I think early coordination is critical. And encouraging re-

views to be conducted concurrently and allowing planning materials to be better integrated into the review process.

I do believe that these provisions will have a meaningful impact to help deliver thoroughly reviewed transportation projects more quickly. In fact, we have already seen tangible benefits from projects that have utilized the MAP-21 provisions. I will give you an example.

Following the collapse of the Interstate 5 bridge in Washington State early this year, State officials were able to utilize one of the MAP-21 provisions, a new categorical exclusion for emergency repairs of roads and bridges damaged in a disaster. Now, I want to make a point here. As we see the climate change, and we see the flooding increasing, and we see the problems we are facing, we need to have this categorical exclusion for emergency repairs of our roads and our bridges that are damaged in a disaster.

And that is what we did. I am very proud of the work that we did, because it allowed for a very fast repair and a rebuilding of a permanent span across the Skagit River.

While some of MAP-21's project delivery provisions were implemented in short order, many of the other provisions require DOT to develop and issue new regulations. It is important that DOT stay focused on completing these rulemakings in order for the public to benefit from these reforms. Remember what we want is speedier delivery with all the protections for the environment and public health built in.

Today we will get an update on the status of the MAP-21 provisions, and I do look forward to hearing from all the witnesses here and the Inspector General. And now I call on my ranking member, Senator Vitter.

**OPENING STATEMENT OF HON. DAVID VITTER,  
U.S. SENATOR FROM THE STATE OF LOUISIANA**

Senator VITTER. Thank you, Madam Chair, very much, and thanks to all of our witnesses and the members here. I certainly agree, this is an important hearing. Any legislation is only as good as its implementation. That is why we are having oversight hearings to make sure we stay on track with regard to implementation. And certainly a key goal and focus of MAP-21 was accelerating project delivery. So I really applaud and welcome this focus.

The desire for that reform grew from something pretty simple and basic, real frustration over projects stuck in bureaucratic purgatory. In Louisiana, just as an example, the Houma-Thibodaux to LA 3127 connection, that is a project designed to serve as a primary north-south artery to provide direct access to the I-10 corridor and serve as a critical evacuation route for emergency and disaster situations.

As this poster shows, this project has been bogged down in an analyst EIS process for over 9 years, with really no end in sight. After a very costly, very long process, the project has gone through 25 NEPA steps but has yet to produce one job. And again, to underscore what the Chair said, nobody is saying get rid of the NEPA process, nobody is saying get rid of the review process. But it needs to be far more efficient and straightforward.

So before the passage of MAP-21, there was a growing consensus on all levels that a project delivery and that NEPA process was broken and in real need of reform. First, the average delivery of major highway projects was 14 years from start to finish. Second of that, the average time for environmental review for major transportation projects had increased to a staggering 8 years, up from 3 and a half years a decade before.

Third, in spite of the fact that the average EIS spanned 22 pages in length when NEPA was first written, today major projects often seen these documents at over 1,000 pages. That is just unacceptable. And it translates into this bureaucratic purgatory and increased costs and endless delay that we are talking about. So we included real concrete provisions in MAP-21 to make changes to that. That is what we are going to see today, what progress there has been.

I want to underscore two things. First of all, we have already seen some success stories. For instance, last Sunday Washington reopened its new I-5 bridge just 4 months after its collapse because of provisions in MAP-21 to allow projects damaged in an emergency situation to have expedited review. In addition, projects such as I-69 in Indiana, the Highway 62 corridor in Oregon and the Illiana Parkway in Illinois and I-90 avalanche bridges in Washington have all benefited from another MAP-21 provision that allows for documents to be published concurrently, a simple step that streamlines the process.

But I think more needs to be done. In particular, I want to strongly encourage DOT to set concrete target dates for the implementation of both specific provisions and overall implementation of the streamlining we are talking about. My understanding is that within DOT, there are not specific target dates for this implementation. I think that has to change.

So I look forward to all of the testimony and a very productive discussion. Thank you, Madam Chair.

Senator BOXER. Thank you, Senator.  
Senator Udall.

**OPENING STATEMENT OF HON. TOM UDALL,  
U.S. SENATOR FROM THE STATE OF NEW MEXICO**

Senator UDALL. Thank you, Madam Chair. I want to thank you and your staff for working so hard on putting this hearing on today, and thank you for your mention in your opening.

I think we all want to be responsive to an issue that frustrates many of our constituents and project developers, that is, project delays. This Committee is seeking solutions to accelerate and streamline important infrastructure projects in all of our States.

But here is my concern. We are going down this road assuming that NEPA is the problem, without fully understanding that impacts that NEPA streamlining can have. And we are applying provisions developed for highway projects to a variety of other situations, such as the WRDA bill. A one size fits all solution is not the answer. I strongly believe that NEPA reviews are often unfairly blamed for project delays. The No. 1 concern I hear in New Mexico is about funding. That is what is holding back our infrastructure development.

For over 40 years, the National Environmental Policy Act has been the foundation for sound Federal decisionmaking. NEPA reviews ensure that environmental consequences of Federal actions are fully evaluated and fully accounted for before decisions are made. That saves taxpayer funds from being wasted on destructive projects.

NEPA reviews foster robust evaluations of Federal activities by Federal resource agencies, and perhaps most critically, NEPA makes sure that the public has a say, has a voice in decisions that affect the health, safety and economic well-being of millions of Americans, decisions that impact the Nation's treasured natural resources, provide transparency in the use of their hard-earned tax dollars. It is crucial that the public be heard.

Critics of NEPA complains that the reviews are too long, too time-consuming. There is always room for improvement. But NEPA reviews also expose the true costs of ill-conceived proposals and environmentally damaging proposals. More often, NEPA leads to better projects and substantial savings for taxpayers.

Last July, President Obama signed into law the Transportation Authorization bill, MAP-21. MAP-21 provided funding for surface transportation in 2013 and 2014. It also made some significant policy changes. The goal was to improve project delivery and cut costs.

Many legal experts and conservationists have expressed concern about these provisions, that they limit the time for review, that they remove the public from the process, they endanger and that they endanger the environment, and that they may allow agencies responsible for projects to pressure agencies like EPA and the Fish and Wildlife Service into approvals. That can lead to litigation, more delays and more costs.

While we are looking into these issues, Congress is looking to use the streamlining reforms in MAP-21 as a template for many other projects. For example, we recently passed a Water Resources Development Act that applies these provisions to all Army Corps projects. The Energy Committee is considering similar approaches for a forestry bill and energy infrastructure, like pipelines. All told, over 30 pieces of legislation, counting both House and Senate, have been proposed, all aimed to streamline or limit environmental reviews. This is hasty, it is premature, and it may do more harm than good.

These bills now under consideration would limit public input and government transparency and environmental review. NEPA guarantees that all stakeholders, which includes businesses, private property owners, tribes, low income populations and all variety of taxpayers, have a say. They have a voice in Federal decisions affecting their communities.

Streamlining review of a reconstruction of an existing highway may make sense. But I am concerned that applying these proposals much more broadly will undercut this crucial process and that there could be profoundly dangerous repercussions for energy permitting, our fresh water supplies, for how our infrastructure is built, how public lands are managed, and how the Nation responds to climate change, one of the critical issues of our century.

So again, Madam Chair, I know we are looking for solutions and I am hopeful that we can work together to find them. We must

take the time to understand the impacts of the proposals and craft the kinds of solutions that will truly increase efficiencies and promote smarter projects. I hope that is what this hearing is, the beginning of looking at that.

Thank you, Madam Chair.

Senator BOXER. Thank you, Senator.

Senator Inhofe.

**OPENING STATEMENT OF HON. JAMES M. INHOFE,  
U.S. SENATOR FROM THE STATE OF OKLAHOMA**

Senator INHOFE. Thank you, Madam Chair. My staff has put together a brilliant opening statement for me, which I am not going to use, but I ask unanimous consent that it be made a part of the record at this time.

I want to mention a couple of other things. I know a lot of my alarmist friends, a lot of whom are in this audience today and around this table, are a little distressed with recent findings in the science that has come out from the Mail and the Telegraph, both of being from London, and the Wall Street Journal, and scientists from all around who have observed that the Arctic ice cap has increased by 60 percent just this last year, and that they are projecting now that we are already into a cooling period.

I only bring that up, because I know that is a topic that is always very prevalent here in this group.

Anyway, I will ask unanimous consent to make part of the record three of the documents that I just referred to.

Senator BOXER. Without objection, so ordered.

[The referenced information follows:]

[Back to previous page](#)



document 1 of 1

Now we're warned to get ready for global cooling: Scientists do huge turnaround as growing Arctic ice cap proves warming has 'paused' [Eire Region]

Rose, David. **Mail on Sunday** [London (UK)] 08 Sep 2013: 28.

*David MAIL*

### Abstract (summary)

The pause - which has now been accepted as real by every major climate research centre - is important, because predictions of ever-increasing global temperatures made many of the world's economies divert billions of euro into 'green' measures in a bid to combat climate change.

### Full Text

A CHILLY Arctic summer has left nearly a million more square miles of ocean covered with ice than at the same time last year - an increase of 60%.

The rebound from 2012's record low comes six years after the BBC reported that global warming would leave the Arctic ice-free in summer by 2013.

Instead, days before the autumn re-freeze is due to begin, an unbroken ice sheet more than half the size of Europe already stretches from the Canadian islands to north Russia.

The Northwest Passage from the Atlantic to the Pacific has remained blocked by pack-ice all year. More than 20 yachts that had planned to sail it have been left ice-bound and a cruise ship attempting the route was forced to turn back.

Some eminent scientists now believe the world is heading for a period of cooling that will continue until the middle of the century - a process that would expose forecasts of catastrophic warming as misleading.

The disclosure comes 11 months after the MoS triggered intense political and scientific debate by revealing that global warming has 'paused' since the beginning of 1997 - an event that the computer models used by climate experts failed to predict. In March, this newspaper also revealed temperatures will drop below the level the models forecast with '90% certainty'. The pause - which has now been accepted as real by every major climate research centre - is important, because predictions of ever-increasing global temperatures made many of the world's economies divert billions of euro into 'green' measures in a bid to combat climate change.

The continuing furore has forced the UN's climate change body to hold a crisis meeting.

The UN Intergovernmental Panel on Climate Change (IPCC) was due in October to start publishing its Fifth Assessment Report - issued every six or seven years. It will now hold a pre-summit in Stockholm later this month.

Leaked documents show that governments which finance the IPCC are demanding more than 1,500 changes

<http://search.proquest.com/printviewfile?accountid=45340>

to the report's 'summary for policymakers', arguing its current draft does not properly explain the pause.

news@mailonsunday.ie

HOW ICE SHEET GREW 920,000 SQUARE MILES IN A YEAR AUGUST 2012 CONTRACTION: This Nasa satellite image shows the ice at the smallest extent on record, with much of the Arctic Ocean uncovered AUGUST 2013 RECOVERY: Contrary to predictions that the ice would have vanished by this summer, it has actually increased in size by 60% from last year NASA

Effects to last until the middle of this century

Credit: By David Rose

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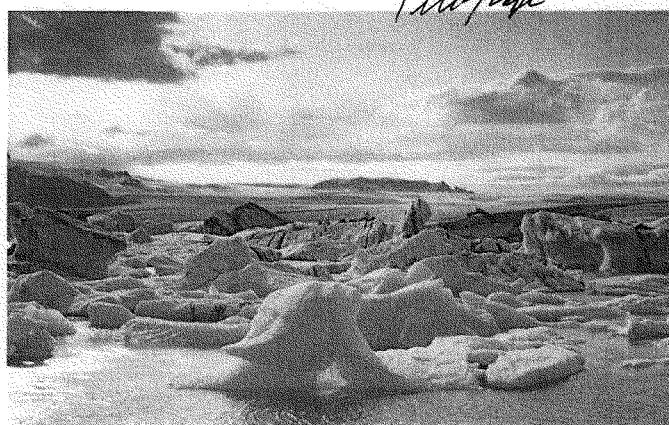
#### **Indexing (details)**

<b>Subject</b>	Climate change; Global warming; Environmental protection
<b>Location</b>	Arctic Ocean
<b>Title</b>	Now we're warned to get ready for global cooling: Scientists do huge turnaround as growing Arctic ice cap proves warming has 'paused' [Eire Region]
<b>Author</b>	Rose, David
<b>Publication title</b>	Mail on Sunday
<b>First page</b>	28
<b>Publication year</b>	2013
<b>Publication date</b>	Sep 8, 2013
<b>Year</b>	2013
<b>Section</b>	News
<b>Publisher</b>	Solo Syndication, a division of Associated Newspapers Ltd.
<b>Place of publication</b>	London (UK)
<b>Country of publication</b>	United Kingdom
<b>Publication subject</b>	General Interest Periodicals--Great Britain
<b>Source type</b>	Newspapers
<b>Language of publication</b>	English
<b>Document type</b>	News
<b>ProQuest document ID</b>	1430717298
<b>Document URL</b>	<a href="http://search.proquest.com/docview/1430717298?accountid=45340">http://search.proquest.com/docview/1430717298?accountid=45340</a>
<b>Copyright</b>	Copyright (c) Associated Newspapers Ltd. 2013
<b>Last updated</b>	2013-09-08
<b>Database</b>	ProQuest Newsstand

Global warming? No, actually we're cooling, claim scientists - Telegraph <http://www.telegraph.co.uk/earth/environment/climatechange/1029408..>

## Global warming? No, actually we're cooling, claim scientists

A cold Arctic summer has led to a record increase in the ice cap, leading experts to predict a period of global cooling.



Major climate research centres now accept that there has been a "pause" in global warming since 1997. Photo: ALAMY

By Hayley Dixon

9:55AM BST 08 Sep 2013

There has been a 60 per cent increase in the amount of ocean covered with ice compared to this time last year, the equivalent of almost a million square miles.

In a rebound from 2012's record low, an unbroken ice sheet more than half the size of Europe already stretches from the Canadian islands to Russia's northern shores, days before the annual re-freeze is even set to begin.

The Northwest Passage from the Atlantic to the Pacific has remained blocked by pack-ice all year, forcing some ships to change their routes.

A leaked report to the UN Intergovernmental Panel on Climate Change (IPCC) seen by the Mail

Global warming? No, actually we're cooling, claim scientists - Telegraph <http://www.telegraph.co.uk/earth/environment/climatechange/1029408...>

on Sunday, has led some scientists to claim that the world is heading for a period of cooling that will not end until the middle of this century.

If correct, it would contradict computer forecasts of imminent catastrophic warming. The news comes several years after the BBC predicted that the arctic would be ice-free by 2013.

Despite the original forecasts, major climate research centres now accept that there has been a "pause" in global warming since 1997.

The original predictions led to billions being invested in green measures to combat the effects of climate change.

The changing predictions have led to the UN's climate change's body holding a crisis meeting, and the IPCC is due to report on the situation in October. A pre-summit meeting will be held later this month.

But the leaked documents are said to show that the governments who fund the IPCC are demanding 1,500 changes to the Fifth Assessment Report - a three-volume study issued every six or seven years – as they claim its current draft does not properly explain the pause.

The extent to which temperatures will rise with carbon dioxide levels and how much of the warming over the past 150 years, a total of 0.8C, is down to human greenhouse gas emissions are key issues in the debate.

The IPCC says it is "95 per cent confident" that global warming has been caused by humans - up from 90 per cent in 2007 – according to the draft report.

However, US climate expert Professor Judith Curry has questioned how this can be true as that rather than increasing in confidence, "uncertainty is getting bigger" within the academic community.

Long-term cycles in ocean temperature, she said, suggest the world may be approaching a period similar to that from 1965 to 1975, when there was a clear cooling trend.

At the time some scientists forecast an imminent ice age.

Professor Anastasios Tsonis, of the University of Wisconsin, said: "We are already in a cooling trend, which I think will continue for the next 15 years at least. There is no doubt the warming of

Global warming? No, actually we're cooling, claim scientists - Telegraph <http://www.telegraph.co.uk/earth/environment/climatechange/1029408...>

the 1980s and 1990s has stopped."

The IPCC is said to maintain that their climate change models suggest a pause of 15 years can be expected. They have denied that there are any crisis meetings over the report.

Other experts agree that natural cycles cannot explain all of the recorded warming.

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**THE WALL STREET JOURNAL**  
WSJ.com

WORLD NEWS Updated September 10, 2013, 8:49 p.m. ET

## Arctic Ice Grows Again in August After Record 2012 Melt

By GAUTAM NAIK

The area of Arctic sea ice was nearly 30% greater in August than a year ago, according to recent satellite data, though projections based on longer-term trends suggest the sea ice will continue its decline over time.

Arctic sea ice covered 2.35 million square miles in August, up from 1.82 million square miles a year earlier, according to the National Snow and Ice Data Center, or NSIDC, in Boulder, Colo. The level recorded last year was a record low.

Arctic sea ice partially melts each summer and re-forms in the winter. "It's been much colder in the Arctic this summer, so not much ice has melted," said Julienne Stroeve, climatologist at NSIDC. The measurements were based on data obtained from U.S. weather satellites. The nearly 30% year-to-year increase partly reflects the extreme low level of sea ice in August 2012.

"If you get a record one year, you don't expect another record the next year," said Chris Rapley, professor of climate science at University College London. He also noted that data on the area of sea ice doesn't capture the whole picture, because it doesn't include the thickness—and therefore volume—of sea ice. Scientists say they need to obtain better data to gauge changes to Arctic ice volumes.

Arctic sea ice will be a key issue addressed in an October report by the United Nations Intergovernmental Panel on Climate Change that is expected to reiterate a long-term declining trend in Arctic summer sea ice. NSIDC data show that monthly August ice extent in the Arctic declined 10.6% a decade from 1979 to 2013. Estimates for further declines vary, but some models suggest that the Arctic will lose its August ice cover entirely by 2060, according to Dr. Stroeve.

The primary significance of this year's increase is that "the narrative of the 'spiral of death' for the sea ice has been broken," according to Judith Curry, climatologist at the Georgia Institute of Technology. "It remains unclear as to what extent the decline in sea ice over the past decades is caused by natural variability versus greenhouse warming. Whether the increase in 2013 is a one year blip in a longer declining trend, or whether it portends a break in this trend remains to be seen."

Scientists are continuing to debate the cause of the decline in the rate of warming over the past 15 years. A significant contributing factor seems to be associated with a shift in Pacific Ocean

Arctic Ice Grows in August After Record 2012 Melt - WSJ.com

<http://online.wsj.com/article/SB100014241278873238646045790672...>

circulation patterns.

**Write to** Gautam Naik at [gautam.naik@wsj.com](mailto:gautam.naik@wsj.com)

*A version of this article appeared September 11, 2013, on page A5 in the U.S. edition of The Wall Street Journal, with the headline: Arctic Ice Grows Almost 30% After Record Melt in 2012.*

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[www.djreprints.com](http://www.djreprints.com)

Senator INHOFE. Thank you very much.

The other thing I want to just mention, if I could, and you can see, I think the audience already knows, we have both occupied the same position that you are occupying today, so we both know it pretty well.

Senator BOXER. We know what, that climate change is real?

[Laughter.]

Senator INHOFE. No. Procedures.

I know that, Ms. Sutley, I will just kind of forewarn you, I have a couple of questions I will be asking at question time having to do with some of the alleged conflict of interest or maybe violation of the Hatch Act, as a result of two things coinciding at the same time: one, your event that you had, two events I guess in Providence and Hartford, and at the same time, the Organizing for Action, the executive director was your former chief of staff, coming out with criticism of a lot of Republicans. That is purely a political organization. In fact, they hold that thing, all the Republicans at this table, along with 131 others, received this award. Actually, it is kind of a nice award, the unicorn award.

But as a result of those accusations, I have sent you a letter and I would appreciate very much if we could get a response to the specific questions that we asked. I think it is something that at least needs to be addressed. There may not be anything to it. But any time two things happen simultaneously, there is always room for suspicion and I think people understand that.

So I will be asking that we make a part of the record the three letters, two from me to you, and then one from you to me, at this time. That is a unanimous consent request.

Senator BOXER. It is so ordered. But I will also allow you to answer in my question time.

[The referenced information follows:]

*Letter # 1*

JAMES M. INHOFE  
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ARMED SERVICES  
INTELLIGENCE *ex officio*  
ENVIRONMENT AND  
PUBLIC WORKS

## United States Senate

WASHINGTON, DC 20510-3803

August 14, 2013

The Honorable Nancy Sutley  
Chairman  
Council on Environmental Quality  
The White House  
1600 Pennsylvania Avenue  
Washington, DC

Dear Chairman Sutley,

Over the past several days, a number of news reports have noted your participation, together with other Administration officials and Members of Congress, in environmental advocacy events that are taking place today in Providence, Rhode Island and Hartford, Connecticut. It appears these events, coordinated by the White House Council on Environmental Quality (CEQ), have coincidentally fallen in conjunction with the Obama political apparatus, Organizing for Action's (OFA) massive campaign this week against sitting Members of Congress whose views on climate change oppose those of the President.

Any inappropriate coordination being conducted among the White House, Members of Congress, the Environmental Protection Agency (EPA) and OFA is of grave concern. The OFA activities are clearly political in nature, solely targeting Republican members of the House and Senate for campaign purposes. This is alarming because on February 25 of this year, after reports surfaced that OFA was selling quarterly meetings with the President in exchange for \$500,000 donations, White House Press Secretary Jay Carney claimed that OFA was an independent organization and would not be engaged in political activities. Clearly OFA is now engaging in political activities and it appears as though they are closely coordinating efforts with your office and EPA, negating their independence.

The appearance, with the press at least, is that CEQ and EPA are in lockstep with OFA in campaign related events that are not only designed to actively push the President's political agenda, but also actively target Members of Congress. The involvement of CEQ and EPA at these events, highlighting the work of OFA, brings a level of legitimacy to an otherwise dubious organization. It raises serious doubts about whether OFA is actually the independent entity the White House claims it to be, or whether it is an official extension of the President's Administration. At minimum, this coordination is deceiving to the American public, and it is potentially illegal. Any coordination between CEQ and OFA in the timing, scope, and execution of this week's events and campaign activities may have serious Hatch Act enforcement consequences. Therefore, as the Ranking Member of the Oversight Subcommittee of the Senate

Environment and Public Works Committee, I hereby request the following information and documents be provided to my office within fifteen business days:

- 1) (a) Any written or electronic correspondence including emails, letters, faxes, text messages, images, instant electronic messages or other documents between members and staff of CEQ, including Chairman Sutley with any official, staff person, or representative of OFA, paid or unpaid, involving the selection of dates, sharing of talking points, draft press releases, or any written communications at all involving the CEQ events scheduled for August 14, 2013 in Rhode Island and Connecticut.  
(b) Any phone logs, notes from any telephone conversations, voice mail messages, or records of any such calls between members and staff of CEQ, including Chairman Sutley with any official, staff person, or representative of OFA, paid or unpaid, involving the selection of dates, sharing of talking points, draft press releases, or any written communications at all involving the CEQ events scheduled for August 14, 2013 in Rhode Island and Connecticut.  
(c) Any meeting notes, records of meetings or informal discussions between members and staff of CEQ, including Chairman Sutley with any official, staff person, or representative of OFA, paid or unpaid involving the selection of dates, sharing of talking points, draft press releases, or any written communications at all involving the CEQ events scheduled for August 14, 2013 in Rhode Island and Connecticut.
- 2) Any records or documents as referenced in question number one that involve any other potential dates for such activities or other potential locations. In addition, please provide any internal CEQ communications of any sort involving the selection of the dates or other potential dates.
- 3) Please provide any records or documents as referenced in question number one between the CEQ and the EPA, including the regional offices.

I appreciate your prompt attention to this matter. Please do not hesitate to contact me or my Staff Director, Luke Holland, with any questions at 202-224-4721.

Sincerely,



James M. Inhofe  
Ranking Member  
Subcommittee on Oversight  
Senate Environment and Public Works Committee

*Response to letter # 1*



EXECUTIVE OFFICE OF THE PRESIDENT  
COUNCIL ON ENVIRONMENTAL QUALITY  
WASHINGTON, D.C. 20503

September 6, 2013

The Honorable James M. Inhofe  
Ranking Member, Subcommittee on Oversight  
Committee on Environment and Public Works  
United States Senate  
Washington, D.C. 20510

Dear Senator Inhofe:

I am writing in response to your letter of August 14, 2013, concerning the Council on Environmental Quality's ("CEQ's") participation in events that occurred in Providence, Rhode Island and Hartford, Connecticut on August 14, 2013. Your letter requested information regarding CEQ's coordination, if any, regarding the timing, scope, or execution of these events with Organizing for Action (OFA) and the Environmental Protection Agency (EPA).

The energy and climate change events in Rhode Island and Connecticut were planned to further the Administration's commitment to reduce carbon pollution, move our economy towards American-made clean energy sources, and prepare local communities for the impacts of climate change. These events included Senators, Congressmen, Governors, and other State and local elected officials. At the events participants discussed information from state-by-state fact sheets previously released by the Administration which detail how carbon pollution and extreme weather and other impacts of climate change are affecting families and businesses in Rhode Island and Connecticut. They also focused on common-sense steps the Administration and local leaders have taken to invest in clean, efficient sources of energy and stronger, more resilient communities in these states.

CEQ did not coordinate these events with OFA. CEQ frequently coordinates with other levels of government and other Federal agencies, including the EPA. That is a central part of CEQ's statutory mission.

Should you have further questions, please do not hesitate to contact me or to have your staff contact Trent Bauserman, CEQ's Associate Director for Legislative Affairs.

Sincerely,

Nancy H. Sutley  
Chair

*NO MENTION OF DOCUMENT  
REQUEST*

Cc: Senator Sheldon Whitehouse, Chairman

*Letter # 2*

JAMES M. INHOFE  
SENATOR

UNITED STATES SENATE

113th CONGRESS

SENATE

UNITED STATES

ARMED SERVICES  
INTELLIGENCE ex officio  
ENVIRONMENT AND  
PUBLIC WORKS

## United States Senate

WASHINGTON, DC 20510-3603

September 13, 2013

The Honorable Nancy H. Sutley  
Chairman  
Council on Environmental Quality  
The White House  
Washington, D.C. 20503

Dear Chairwoman Sutley,

I appreciate you taking the time to respond to my August 14, 2013, letter. Addressing potential violations of the laws separating government officials' campaign activities from their official duties is an important national priority. That is why I am eager to understand whether any inappropriate coordination has occurred between the Council on Environmental Quality (CEQ) and Organizing for Action (OFA).

I understand that CEQ may not have been the primary sponsor of the events you participated in on August 14, 2013; however, because government officials from other agencies also participated in the events, I cannot accept that there was no communication between them. Further, these events occurred in conjunction with overtly political actions by OFA to pressure Republican Members of Congress to embrace the President's policies on global warming, leading me to believe that there may have been some inappropriate communication between you, your Council, and OFA that could be in violation of the Hatch Act. By failing to respond to the substantive requests of my letter, you are indicating that no communication between the interested parties occurred, which I do not believe to be the case.

The American people are concerned about OFA and deserve to know whether its relationship with the federal government is inappropriate or running afoul of the law. OFA is secretive, and many admit that they do not understand how it is structured or works. Considering that OFA both maintains an Internet presence bearing the President's name while concurrently offering to sell access to him in exchange for \$500,00 donations makes me wonder where the White House ends and OFA begins. This makes it important for the relationship between CEQ and OFA to be fully understood.

In my previous letter, I asked whether any communication had been exchanged between you and your staff and any official at OFA as it related to the August 14 events. Did you or your staff have any communication with OFA about these events or any other, similar events? If so, will you please provide these documents to me in accordance with my original request?

I also asked whether any communications had been exchanged between you, your staff and individuals at the Environmental Protection Agency (EPA), including its regional offices.

Did you or your staff have any contact with EPA about these or other, similar events? If so, will you please provide these documents to me in accordance with my original request?

I appreciate your willingness to address these important issues.

Sincerely,



James M. Inhofe  
Ranking Member  
Subcommittee on Oversight  
Senate Environment and Public Works Committee

Senator INHOFE. The other thing that I think is very, very significant is something that no one has talked about. That is, I have to criticize some of my fellow Republicans. When we had, Madam Chairman, we had on the floor the authorization bill, transportation authorization a year ago, quite frankly, we had a lot of demagogues that went down to the floor, or I call them born-again conservatives, a lot of whom had supported the \$700 billion bailout. They were talking about the fact that this is too much money and all this.

Clearly, the conservative position in the Highway Reauthorization Bill a year ago was to support it. Because the alternative was to have extensions. And we know that extensions cost about 30 percent off the top. In fact, even the American Conservative Union agreed with that.

Well, I have to say to you, Madam Chairman, that I went over, right as soon as we passed that from the Senate, to the House, anticipating we might have objections over there. And I got all 33 Republican members of the T&I Committee, that is Transportation and Infrastructure Committee of the House, in one room where I explained to them what the real, true conservative position was, and that was to give us a well thought-out transportation reauthorization bill.

I this I outlined, and I have to say this publicly, and I have said this before, that I admire and respect so much our Chairman for going along with a lot of the reforms that I don't think she was all that comfortable with. We all gave a little bit to have this bill a year ago now.

The reason I bring that up is that this meeting is about, maybe we are dragging our feet a little bit on implementing these changes. But when I told them about all of the changes that took place in this bill, and I am talking about the NEPA reforms, the streamlining, the ET reforms, they all were shocked to find that out, because they hadn't had a lot of publicity.

So I would say this. We can have just as much support from the Republicans in the House of Representatives if we are successful in coming up with a transportation reauthorization bill, as we did last time. But if we don't move on all of these reforms, and that is the subject of this Committee hearing, we are not going to have a chance at getting it done. So we are going to be really trying to do that in hopes that we will be able to get a robust highway reauthorization bill, which I think we all want, at least at this table.

Thank you, Madam Chair.

[The prepared statement of Senator Inhofe follows:]

**STATEMENT OF HON. JAMES M. INHOFE,  
U.S. SENATOR FROM THE STATE OF OKLAHOMA**

Thank you, Chairman Boxer. Thank you to our panelists. I appreciate this opportunity to check in on the significant strides MAP-21 made in accelerating project delivery.

I recognize this hearing is highway focused, however with my good friend Dan Ashe on the panel, I can't miss this opportunity to address an ESA issue regarding two species which negatively affect development in Oklahoma and nine other States. Although we have a good story to tell on NEPA streamlining in MAP-21, ineffective Endangered Species laws not only endanger the accomplishments of this bill, but damage many other industries and private landowners in Oklahoma.

The hallmark of MAP-21 is its streamlining provisions. Government regulations slow down projects and delay progress. MAP-21 created hard deadlines to lessen red tape, to create greater certainty for project sponsors and eliminate costly delays, which waste taxpayer money.

Despite these reforms, I am concerned that they are not being implemented properly. In July of last year the Oklahoma Department of Transportation notified the Oklahoma Division of the Federal Highway Administration of their intent to begin processing projects as automatic NEPA exemptions based on the clear language of Sections 1316 and 1317 of MAP-21. ODOT was immediately met with some hesitation from DOT pending the completion of rulemaking and the release of guidance from Washington. Over a year later ODOT is still waiting for clarification, which we should already have. In fact, halfway through this reauthorization, we are still waiting for a final rule on these sections—almost a full 7 months overdue.

Furthermore, the Federal Highway Administration has released proposed rule-making which seems to narrow the NEPA exclusions Congress wrote into MAP-21. This has created uncertainty, confusion, and further delays—the exact conditions MAP-21 is supposed to improve. This Committee should not give any consideration to, should not even discuss another highway reauthorization until the MAP-21 reforms are finalized and implemented.

It is my hope that these issues will be addressed to today. I appreciate you all being here and look forward to your testimony.

Senator BOXER. Thank you very much.

Senator Fischer.

**OPENING STATEMENT OF HON. DEB FISCHER,  
U.S. SENATOR FROM THE STATE OF NEBRASKA**

Senator FISCHER. Chairman Boxer and Ranking Member Vitter, thank you for holding this hearing today to discuss accelerating delivery of transportation projects.

This is an important topic that we must continue to examine as we seek to balance transportation and infrastructure needs with environmental protection and community concerns.

I am pleased that this Committee will be meeting again soon to discuss the need to invest in America's infrastructure and preserve Federal transportation funding. In an age of very limited funding for transportation projects, we must ensure that our resources are devoted to tasks that truly add value to the projects and are not wasted on piling up paperwork that only serves to fulfill bureaucratic requirements.

The point should be to maximize results, not process. Our own State's department of roads will attest that the environmental process often does not appear to have outcomes in mind. They have urged us to consider "bearing in mind the scope of the project: is the process proportional to the risk of actual environmental, historical or social harm? If the process is not outcomes or performance based, what is its purpose and what is being achieved?"

All too often, unfortunately, the process is not proportional to the risk of harm. Time and resources are expended on exercises that add no meaningful environmental, historical or social benefit. Our Governor, Dave Heineman, recently wrote to Secretary Foxx to voice concern about one particularly troubling situation that the Nebraska Department of Roads encounters all too frequently, a problem that our State hopes can be addressed, at least in part, by ongoing rulemaking under MAP-21.

Nebraska develops hundreds of projects each year that meet the criteria of the state of good repair project within the existing right of way. Currently, the amount of time, effort and expense required to document in a categorical exclusion that such projects will not

cause significant impact to the environment is far out of proportion to the environmental and social risk of the undertakings. These CE documents typically run in excess of 20 pages, require consultation with multiple regulatory agencies, and add many months to the project delivery schedule.

Our State has implored the Department of Transportation for help in resolving this issue as DOT undertakes rulemaking for a new categorical exclusion for any project within an existing right of way. I look forward to discussing this and other ways that we can work together so we can ensure our limited infrastructure resources are focused on meaningful outcomes and transportation projects are delivered in a timely manner. Thank you.

Thank you, Madam Chair.

Senator BOXER. Thank you so much.

We are going to move to our esteemed panel, and we are going to start on this end, with Hon. John Porcari, who is Deputy Secretary of Transportation of the U.S. Department of Transportation. Please begin.

**STATEMENT OF HON. JOHN D. PORCARI, DEPUTY SECRETARY OF TRANSPORTATION, U.S. DEPARTMENT OF TRANSPORTATION**

Mr. PORCARI. Chairman Boxer, Ranking Member Vitter and members of the Committee, thanks for inviting me here today to discuss the Department of Transportation's work to improve the delivery of transportation projects.

At DOT, we are committed to providing the American people with a safe and efficient transportation system. We never stop looking for better ways to do our jobs. That is why we are working to deliver infrastructure projects more efficiently and to stretch the value of every dollar.

We are accomplishing this through the implementation of our current transportation bill, MAP-21, as well as the Administration's ongoing efforts to expedite environmental permitting and reviews. As you know, MAP-21 laid out a number of provisions designed to move infrastructure projects from conception to completion more efficiently.

Immediately after passage, we began working aggressively to fulfill all of these requirements. We have an internal working group that I chair that is focused on doing that.

The Federal Highway Administration estimates that annually, about 9,700 projects are covered by categorical exclusions which involve no significant environmental impacts and require limited documentation, analysis or review under NEPA. Approximately 130 environmental assessments are processed in a year, which can take just a couple of months to complete, if done right. And 37 projects on average require a full environmental impact statement, which is the most rigorous form of NEPA analysis.

While the EIS projects represent only a tiny minority of projects, they also tend to be the most important and transformational projects. They are the same changers. Of the projects completed each year, it is estimated that 98 percent are CEs, 1.7 percent are environmental assessments and only .3 percent are environmental impact statements.

One of our highest priorities under MAP-21 was to establish a new categorical exclusion for emergency projects that allows us to get to work repairing and reconstructing infrastructure faster. As both the Chairman and Ranking Member have mentioned, when a section of the I-5 bridge in Washington State collapsed in May, we had this exclusion in place to restore the critical piece of infrastructure. The temporary bridge was in place within 3 weeks, and just a few days ago, last weekend, I am pleased to say that the new permanent bridge was slid into place, and it is now open to traffic.

Another accomplishment under MAP-21 is the new combined final environmental impact statement and record of decision, which cuts down on the review time. That has already allowed four major projects to be completed a month faster.

Additionally, we have published a proposed rulemaking on the Surface Transportation and Project Delivery program, which allows States to assume responsibility for certain environmental reviews. For example, we are already working with the State of Texas to take on those authorities.

Our efforts to speed project delivery go far beyond MAP-21, including the Federal Highway Administration's Every Day Counts initiative. Every Day Counts shares best practices with project sponsors around the Country to shorten project timelines, save money, enhance safety and protect the environment. Communities around the Country are already benefiting from this. This is an ongoing process for us.

One of those best practices that we would like to see employed by everyone is the development of programmatic agreements. These agreements allow project sponsors to collaborate with resource agencies to develop a broad approach to addressing common environmental problems, rather than repeatedly developing individual mitigation plans for repeated projects. A great example of that partnership with the U.S. Fish and Wildlife Service is the Indiana bats, a larger approach which protects both the resource and permits projects to move more quickly.

We have also worked with the advisory council on historic preservation to address historic assets while making improvements on bridges built after 1945. These are concrete and steel bridges, these are not old wooden covered bridges. But the advisory council has jurisdiction over them. So we now have a pre-approved process that applies to every project like that that lets the projects comply with Section 106 in advance.

President Obama has called on us to clear away the red tape that slows down too many construction projects. We are proud to answer the President's call on that. We are committed to achieving this goal by cutting the review and permitting timelines in half for major infrastructure projects. In 2011, we worked closely with our partners to establish aggressive environmental and permit review timelines for the first six high priority transportation projects. Thanks to these efforts, we were able to complete the environmental impact statement for one of those six, New York's Tappan Zee Bridge, in 1 year. That is reducing the overall timeline for a major EIS by as much as 3 or 4 years. So we have built on this progress by identifying an additional 15 projects that have national or regional significance for expedited reviews. We are making it

easier for everyone to track these projects by approving the public dashboard, which displays nationally and regionally significant project schedules and helps institutionalize the best practices.

Senator BOXER. Could you sum it up? We are running out of time.

Mr. PORCARI. Yes. Chairman, in short, we believe that we can bring measurably better outcomes in return for a faster, more predictable process. That is our mission statement.

[The prepared statement of Mr. Porcari follows:]

STATEMENT OF  
**JOHN PORCARI**  
DEPUTY SECRETARY  
U.S. DEPARTMENT OF TRANSPORTATION

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS  
U.S. SENATE

HEARING ON

*Implementing MAP-21's Provisions to Accelerate Project Delivery*

September 18, 2013

Chairman Boxer, Ranking Member Vitter, Members of the Committee:

Thank you for inviting me here today to discuss our progress in expediting the delivery of transportation projects.

Both before and after the passage of the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21), we have been working extensively to improve the efficiency of environmental reviews of transportation projects. I am pleased to share with you our efforts to date to rebuild our nation's infrastructure and put Americans back to work as soon as possible.

We are committed to providing the American people with safe, reliable transportation choices, and we acknowledge that delivering those projects can take a long time. There are many causes for this delay. The Congressional Research Service (CRS) has reviewed the causes of project delay and found that the "Causes of delay that have been identified are more often tied to local/state and project-specific factors, primarily local/state agency priorities, project funding levels, local opposition to a project, project complexity, or late changes in project scope."<sup>1</sup>

Nonetheless, we recognize that there is an opportunity to improve the Federal permitting and review processes to deliver those projects and that is the focus of my testimony today. To improve the Federal environmental review and provide more timely decisions for transportation projects we are working with our sister agencies and the President's Council on Environmental Quality (CEQ) to re-engineer the process, seeking ways to provide better outcomes for communities and the environment and a faster, more predictable process. The project delivery provisions found in MAP-21 are in many cases consistent with the Administration's broader efforts. The provisions on programmatic mitigation of environmental impacts, eliminating duplicate reviews, integration of planning and environmental reviews, and assistance to affected Federal and State agencies will help us to move infrastructure projects from concept to

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<sup>1</sup> CRS Report R42479, "The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress." April 11, 2012

completion more efficiently. This will ensure the best value for every taxpayer dollar and reduce undue regulatory burden in delivering transportation projects, while achieving measurably better environmental outcomes.

#### **Status of Implementation**

Immediately after passage, we began working aggressively to fulfill all the requirements of MAP-21. Although facing ambitious deadlines, we are meeting and exceeding Congress's challenge through our outreach to partners and development of guidance and rulemakings.

One of our highest priorities was to establish the new Categorical Exclusion (CE) under the National Environmental Policy Act (NEPA) for repair or reconstruction projects required after emergencies. We issued a proposed rulemaking on October 1, 2012, and the CE became effective in February of this year. Our prompt implementation of this CE let us move quickly when faced with the collapse of a section of the Interstate 5 Bridge in Washington State. The use of the new CE is helping Washington State swiftly restore this critical infrastructure.

Another success came with the implementation of the Combined Final Environmental Impact Statement (EIS) and Record of Decision (ROD) procedure, for which we issued interim guidance in January. Four projects have already used this new procedure, allowing these reviews to be completed at least 30 days earlier.

Similarly, we quickly issued guidance regarding the changes to the Statute of Limitations provision, which has reduced litigation risk for over a dozen projects thus far. We also recently published a proposed rulemaking on the Surface Transportation Project Delivery Program provision, which allows States to assume responsibility for certain environmental reviews. Texas passed legislation enabling it to apply for this delegated responsibility, so our timely publication of the proposed rulemaking provides critical information to Texas and other interested States as they develop their applications.

Many of the project delivery provisions require interagency coordination. We have engaged in early informal coordination as much as possible in order to expedite the formal interagency review when needed. For instance, we worked extensively with potentially affected agencies when drafting guidance regarding revised financial penalties. This guidance is now entering the formal interagency review process.

Another example of our interagency collaborative efforts can be seen through our implementation of the Programmatic Agreements and Additional Categorical Exclusions requirement in MAP-21. To carry out this requirement, we conducted a survey of stakeholders to consider additional CEs that could be created to help sponsors move ahead with their transportation priorities without unnecessary delays. We worked with other Federal agencies to review the survey results and draft a rulemaking that proposes additional CEs. We expect to publish this proposed rulemaking soon.

We welcome the opportunity to update and make our regulations more efficient, and have integrated this effort with ongoing rulemakings work whenever possible. For instance, the

Federal Transit Administration (FTA) was in the process of updating its environmental review procedures when MAP-21 was enacted, so it adapted its rulemaking to respond to the requirements of MAP-21. This final rulemaking was issued in February and created new FTA CEs for many of the actions covered by the MAP-21 CEs, which helped to streamline the implementation of these provisions.

#### **Executive Actions to Improve the Permitting and Review Process**

However, our efforts to speed project delivery go far beyond MAP-21. In August of 2011, nearly a year prior to MAP-21 enactment, we were a leader in the President's call to expedite the permitting and review process for certain infrastructure projects identified as high priority (HPPs). We led the effort under this initiative for six of the fourteen total high priority projects initially posted on the Federal Infrastructure Permitting Dashboard (Dashboard), publicly posting schedules and detailing the milestones necessary to complete the permitting process. These major investments included transit projects in Los Angeles and Baltimore; deployment of NextGen technology in the Houston Metroplex; a critical transportation link in Provo, Utah; and the replacement of two bridges in the Northeast, the John Greenleaf Whittier Bridge and the Tappan Zee Bridge.

Under government-wide NEPA procedures, agencies are directed to integrate NEPA reviews and other planning and environmental requirements so that reviews run concurrently, but this does not always occur. For each of the HPPs, we worked extensively with project partners to coordinate and establish aggressive timelines for completion, emphasizing concurrent reviews where possible. The Tappan Zee project highlights the efficiencies that can be achieved when all project partners coordinate early, establish shared expectations for project milestones, focus resources and work collaboratively to achieve those milestones. Using a design-build contracting method, the Federal Highway Administration (FHWA) and the partner agencies were able to complete an EIS and issue a ROD for the Tappan Zee project in just over a year and complete all permitting actions within 15 months. That is a fraction of the time generally required to navigate the project delivery process for many major infrastructure projects.

In order to achieve the aggressive project schedules developed for these critical infrastructure projects on the Dashboard, we partnered with Federal resource agencies and the CEQ to establish the Transportation Rapid Response Team. This interagency group of senior staff continues to meet bi-weekly to identify and resolve concerns from agency partners. The relationships built among the staff and the agencies more broadly further our efforts to better align Federal actions and improve consistency and predictability in the permitting and review process. With enactment of MAP-21, the Team was already well-positioned to facilitate the coordination needed to advance rulemakings and guidance documents to meet statutory deadlines and has been instrumental to our success.

The success of the initial HPPs in demonstrating the potential for process streamlining led to a commitment from the President in his 2012 State of the Union Address to clear away "the red tape that slows down too many construction projects" of infrastructure projects and his subsequent issuance of Executive Order (EO) 13604 on *Improving Performance of Federal Permitting and Review of Infrastructure Projects*. Support of this EO led to an expansion of the

Dashboard and the identification of thirty-six projects across multiple sectors, including transportation, that were deemed to have national or regional significance. The schedules and progress for these projects, in addition to the original fourteen, are tracked on the Dashboard, holding all agencies accountable and providing unprecedented transparency to the Federal permitting and review process. Through the Dashboard and Rapid Response Team, we have helped cut review times, delivering significant savings so that the public may enjoy the benefits of upgraded infrastructure sooner.

The successful strategies used to achieve these time savings helped form a *Federal Plan to Modernize the Federal Permitting and Review Process* (Plan), which describes specific steps the Administration is taking to enhance the review process for vital infrastructure projects. Through best practices and specific and measurable actions described in the Plan, we are creating a more transparent and predictable process that will help maintain the confidence of stakeholders, improve engagement with project sponsors, and reduce timelines while protecting the public's health and safety, our security, and the environment.

In May, President Obama issued a Presidential Memorandum tasking Federal agencies with the goal of cutting their review and permitting timelines in half for major infrastructure projects. We continue to lead efforts in this regard, and are well underway to achieving this important goal.

#### **Departmental Efforts to Deliver Projects More Efficiently**

As you know, MAP-21 expanded on significant work that was already underway in the Department. Soon after his confirmation, FHWA Administrator Mendez created the Every Day Counts (EDC) initiative, designed to identify and use innovation aimed at shortening project delivery time, enhancing the safety of our roadways, and protecting our environment.

Several of the accelerated project delivery stipulations in MAP-21 complement the successes of the EDC initiative, by providing an array of provisions designed to move projects from start to finish more efficiently to yield broad benefits nationwide. Congress recognized the benefits of EDC methods by including certain EDC initiatives in MAP-21, such as planning and environmental linkages to minimize duplication of effort and foster more informed decisions, time-saving programmatic agreements, and use of the construction manager–general contractor project delivery method to encourage innovation and optimize construction schedules.

In addition to the EDC initiative already underway at FHWA, FTA recently conducted a thorough look back at its project delivery process and identified some much needed updates. This look back resulted in the creation of an entirely new list of CEs tailored for transit projects to further expedite the environmental review and decision-making process, reducing the need for unnecessary and duplicative reviews. In addition, FTA has refocused staff resources on better managing the environmental review process, resulting in more clear and concise environmental documentation and quicker reviews. FTA's emphasis on providing guidance, Standard Operating Procedures, and training to its field staff has enhanced the Agency's ability to expedite environmental reviews.

The Federal Railroad Administration (FRA) has also taken steps to improve the efficiency of project delivery for rail projects. In January, FRA revised its *Procedures for Considering Environmental Impacts* by creating seven new CEs for classes of action determined not to have a significant effect on the environment. This update will facilitate the efficient delivery of expanded rail programs, including those created through the Passenger Rail Investment and Improvement Act of 2008. The seven new categories cover a broad array of passenger and freight rail projects, including track and track structure maintenance and improvements carried out predominately within the existing right-of-way; bridge rehabilitation, reconstruction or replacement projects also within the existing right-of-way; acquisition, rehabilitation or maintenance of vehicles and equipment; environmental restoration, remediation and pollution prevention activities; and installation of safety-related improvements (e.g., railroad warning devices, train control systems, and signalization and security equipment). The use of these new CEs will save both time and money, eliminating the need for more detailed environmental reviews and expediting project approval and project implementation.

### **Conclusion**

In addition to the work being done in the modes, we are engaged in a comprehensive update of our Department-wide NEPA procedures to ensure consistency across our operating administrations to the greatest extent possible. We are working to ensure that our procedures reflect the new reality of blended funding streams that require an innovative and collaborative approach to the NEPA analysis.

A key lesson we have learned through all of these efforts is that we need a large toolbox to address the various issues that arise during project planning and delivery and to quickly move the many different types of critical infrastructure projects through the permitting and review process. Even within surface transportation, projects do not face the same hurdles and challenges and therefore require different solutions to avoid conflicts during project planning and delivery. A project sponsor would have a very different approach to permitting a bridge project and a streetcar project. One size does not fit all in project delivery, and solutions must consider project context, complexity and impacts. This Administration is committed to improving the process and leveraging all available tools, working across government to find efficiencies and implement comprehensive reform.

Delivering infrastructure projects quickly, stretching the value of every dollar, and ensuring better environmental outcomes are a major priority for this Administration. Our proactive approach to implementing the project delivery provisions of MAP-21, combined with the Administration's ongoing initiatives to use innovative delivery methods and expedite the permitting and review process, is making a difference in accelerating projects from concept to completion.

We must also recognize that creating efficiencies in project delivery is only one piece of a larger challenge facing project sponsors as they try to build and repair our nation's infrastructure. Focusing only on the permitting and reviews ignores the larger issue of sustainable and sufficient funding for the critical infrastructure needs of this country. Repeated attempts to legislatively streamline the process may ultimately result in an environmental review and permitting process

that does not adequately protect our most important resources. Moreover, we haven't accomplished anything if NEPA and permitting are completed quickly, but the project still has no funding to go to construction. We have to find a balance of reform to the permitting and review process while maintaining the critical environmental protections in place, acknowledging that the environmental review process is a contributor but not the primary cause of delay for most major infrastructure projects.

We look forward to working closely with this Committee as we seek that balance and continue these efforts to bring infrastructure improvements to the American people in a faster, better and smarter way.

Thank you for the opportunity to appear before you today. I look forward to answering any questions you may have.

**FINAL QFR RESPONSES FOR  
DEPUTY SECRETARY PORCARI BEFORE SENATE EPW  
SEPTEMBER 18, 2013**

Senator Barbara Boxer

**QUESTION 1a: Deputy Secretary Porcari, I would like to hear more about the Tappan Zee Bridge project. Can you provide a few more details about which agencies worked together with DOT and how the process functioned in order to complete the EIS, issue a Record of Decision, and complete all permitting actions in just 15 months?**

RESPONSE: The Federal Highway Administration took the lead in working with a number of agencies to help expedite the Tappan Zee Bridge project, including the National Marine Fisheries Service, U.S. Army Corps of Engineers, U.S. Coast Guard, Advisory Council on Historic Preservation, and the U.S. Fish and Wildlife Service. Several state agencies were also involved, including the New York State Department of Environmental Conservation, for a total of 10 Cooperating Agencies.

The process for expediting the EIS, ROD, and permits for the Tappan Zee project included several tools. The Tappan Zee Bridge Project utilized previous studies and analyses conducted in preceding years for the I-287 corridor. These studies, such as traffic studies and cultural and seasonal fisheries surveys, were deemed appropriate and valid for the Tappan Zee Bridge project.

FHWA used a number of tools to help facilitate a process of collaboration to meet the accelerated schedule. Examples include:

- *Cooperative Agreement and Agency Summit.* Through the Cooperative Agreement, each agency agreed to collaboration and transparency throughout the process and committed to schedule milestones for EIS publication, ROD signing, and permit issuance. Each agency also provided one dedicated point of contact that had the ability to make rapid and precise decisions on behalf of the agency. The Agency Summit provided the opportunity for executive leadership from the State Project Sponsor to present the Cooperative Agreement and intent and scope of the project to the executive leadership of the Cooperating Agencies. Each agency concurred with the process and then signed the Cooperative Agreement.
- *Design Build/EIS Workshop.* Over a 2-day period, the Cooperating Agencies collectively developed environmental commitments and permit conditions for the project. Agencies reached agreement on the parameters of the bridge design and on the terms and conditions of the anticipated permits. FHWA then incorporated these environmental commitments into the EIS and the request for proposals to the bidders.
- *Integrated Project Team.* The Project Team consisted of technical and legal experts from the State Project Sponsor, the consultant/engineering team, and FHWA. The Project Team met regularly to review and finalize documents. In many cases, the Project Team was able to anticipate the Cooperating Agencies' legal and technical needs in EIS and permit applications, which helped eliminate the need for multiple drafts.
- *Executive Steering Committee (ESC).* The ESC is an internal project committee comprised of executives from the FHWA New York Division, the State Project Sponsor, the Governor's Office, and representatives from the Project Team. The ESC met weekly through the

**FINAL QFR RESPONSES FOR  
DEPUTY SECRETARY PORCARI BEFORE SENATE EPW  
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EIS/ROD process to achieve executive action and approval in a timely fashion. The ESC continues to meet twice per month while the project is under construction.

**QUESTION 1b: Do you think that is a feat that can be replicated with other major projects across the country?**

RESPONSE: For the Tappan Zee project, the Project Team was able to use data from previously generated studies such that studies requiring seasonal surveys or lengthy research were not needed. The specific NEPA studies and analyses required for other major projects and the time to complete quality studies would be a key factor in determining if the timeframe could be repeated on other projects.

Another key factor in determining whether the Tappan Zee example can be replicated with other projects is the degree of agency collaboration and staff commitment. This type of project requires an immense dedication of highly proficient staffing resources from all entities involved.

**QUESTION 2: Deputy Secretary Porcari, you described how the Administration identified a group of high priority projects and publicly posted schedules, milestones, and progress reports for the projects on the Federal Infrastructure Permitting Dashboard. Do you think publicly posting this kind of information for projects on the Internet is helpful and, if so, why?**

RESPONSE: The Federal Infrastructure Permitting Dashboard has helped provide unprecedented transparency and accountability in the permitting and review of major infrastructure projects. Creating schedules providing a clear path to complete the Federal process encourages agencies and project sponsors and keep them all accountable to one another and the public. Further, posting these schedules online provides a more complete picture to the public on the steps necessary to navigate the environmental reviews for these critical infrastructure projects.

**QUESTION 3: Deputy Secretary Porcari, as you note, many of the reasons for project delays are unrelated to the environmental review process. MAP-21's provisions did address other areas for improvement, such as in contracting, planning, and innovative construction methods. Can you describe some of the ways that DOT is implementing these programs and working with States to utilize best practices in these areas?**

RESPONSE: The Department is developing regulations to implement the planning and environmental linkages provisions of MAP-21 and expects to have a final rule in the coming months.

**QUESTION 4: Deputy Secretary Porcari, many of MAP-21's project delivery provisions address complex processes between different Federal agencies. Would you describe how DOT is engaging with these other agencies on the rulemakings and guidance to carry out these provisions?**

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**RESPONSE:** The Department is committed to working with our Federal partners to ensure that we maximize efficiency in project delivery while improving outcomes for communities and the environment, maintaining the critical protections provided by our environmental laws and regulations. The rulemakings and guidance that have been developed to implement the project delivery sections of MAP-21 have been coordinated through the Transportation Rapid Response Team (TRRT). This interagency group was created in support of the President's Memorandum of 2011 identifying High Priority Projects to be expedited and has been critical to timely and efficient interagency review and clearance of guidance and rule-makings required by MAP-21.

Senator Sheldon Whitehouse

**QUESTION 1:** Lead agencies may establish a schedule for completion of the environmental review process "after consultation with and concurrence of each participating agency...." 23 U.S.C. 139(g)(B). With respect to the dispute resolution process established in MAP-21, a lead agency is required to consult with relevant agencies, but their concurrence appears not to be required by statute in all cases.

**Deadlines.** The deadlines referred to in subparagraph (A) shall be those established under subsection (g), or any other deadlines established by the lead agency in consultation with the project sponsor and other relevant agencies. 23 U.S.C. § 139(h)(4)(B), as amended by MAP-21 Section 1306 (emphasis added).

Is it your interpretation of this provision that a lead agency need not seek the concurrence of the project sponsor and other relevant agencies to set deadlines subject to dispute resolution? If so, under what circumstances in which a lead agency may set a deadline without agreement of the project sponsor and relevant agencies? What are examples of the types of deadlines that may be set in those circumstances?

**RESPONSE:** Your question appears to refer to two different aspects of 23 USC 139. Section 139(g)(1)(B)(i) encourages, but does not require, the inclusion of a project schedule in the coordination plan. If a project schedule is included in the project coordination plan, the participating agencies must concur on the project schedule.

With respect to the dispute resolution process, the lead agency may convene an initial dispute resolution meeting at any time (23 USC 139(h)(5)(A)(vi)). The timeframes for the various steps in the dispute resolution process are specified in 23 USC 139(h)(5).

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Senator David Vitter

**QUESTION 1: Have you set deadlines for the remaining 35 actions to fully implement the streamlining-NEPA provisions in MAP-21? If so, please include in your response.**

RESPONSE: The Department is currently working to implement all of the expediting NEPA provisions of MAP-21. Priority has been given to those actions with deadlines in the legislation. In addition to deadlines assigned by Congress, the Department has developed internal tracking deadlines to ensure efficient and continued action to implement these important provisions.

**QUESTION 2: Some of today's testimony explains that NEPA is an important statute for ensuring that the public has an opportunity to comment on proposed projects. I agree that such is the case. The public can play an important role in ensuring that projects are built in an appropriate manner. I think it is important to make clear that the streamlining provisions in MAP-21 do not eliminate the opportunity for public comment. There are some sections where we try to set deadlines for when public comment can happen, but those dates can be waived if the agency decides such a waiver is necessary. Is that your understanding of the law as well?**

RESPONSE: Yes, MAP-21 includes a number of provisions that will improve project delivery. However, a number of the project delivery provisions emphasize early coordination with other agencies in order to identify and resolve concerns, and also call for earlier public input. An example of this is Map-21 Section 1310, Integrating Planning and Environmental Review. In addition, the agency may extend a deadline for good cause, and FHWA can take any questions about the adequacy of public involvement opportunities into account.

**QUESTION 3a: We are pleased to see that the Department of Transportation has a goal of finalizing its rulemakings for Section 1316, the categorical exclusion for projects within the right-of-way, and Section 1317, the categorical exclusions for projects of limited federal assistance. Those are important provisions in the bill that will help get projects built in a more expeditious manner. I am concerned that your proposal under Section 1316 appears to offer a more restrictive definition of right-of-way than is required or intended.**

RESPONSE: Section 1316 of MAP-21 authorizes a categorical exclusion for projects within the "existing operational right-of-way." Section 1316 also provides a definition for "operational right-of-way" without reference to the word "existing." Thus, we are proposing that an "existing" operational right-of-way refers to those portions of the right-of-way that have been disturbed for an existing transportation facility or are regularly maintained for transportation purposes. In other words, for a project to qualify under this CE, a transportation facility must "exist" in the right-of-way in question.

We are proposing to include the phrase "regularly maintained for a transportation purpose" to emphasize that areas within the facilities footprint that some may not think of as operational

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(e.g., clear zones, safety and security areas) can, if serving an existing transportation facility, be considered for the CE.

We are carefully considering all comments received on this issue and hope to publish the final rule soon.

*UPDATE: The final rule regarding Section 1316 was published in January 2014 affirming the agencies interpretation noted above.*

**QUESTION 3b: I am also concerned that your Section 1317 proposal may impose additional restrictions on the CE that were not included in the legislative language. Would you care to respond to those concerns? What will you do to ensure that your efforts to implement the law fall within congressional intent?**

RESPONSE: MAP-21 section 1317 requires the Secretary to promulgate regulations that designate as categorically excluded actions receiving limited Federal funds. Specifically, section 1317(1) of MAP-21 provides for the designation of the CE for “any project—(A) that receives less than \$5,000,000 of Federal funds; or (B) with a total estimated cost of not more than \$30,000,000 and Federal funds comprising less than 15 percent of the total estimated project cost.”

In the NPRM we propose a clarification that such projects must receive some amount of Federal funding to be eligible for these CEs. This includes, but is not limited to, projects receiving Federal grants, loans, loan guarantees, lines of credit, and projects receiving funds authorized for the Federal Lands Access Program, the Federal Lands Transportation Program, and the Tribal Transportation Program. The Federal funding thresholds take into account any Federal funding to cover the capital costs of the undertaking regardless of source, but exclude Federal funds for operating costs and expenses that may be provided to the facility.

The proposed regulatory language also includes the phrase “that do not require Administration actions other than funding” to clarify that the CE is limited to situations where the only Agency action involved is funding. “Administration action” is defined in 23 CFR 771.107(c) as the approval by the Agencies of the applicant’s request for Federal funds for construction, and approval of activities such as joint and multiple use permits, changes in access control, etc., which may or may not involve a commitment in Federal funds. For example, a project that would receive Federal funding at or below the specified limits but that also would need an Interstate access approval from FHWA under section 111(a) of title 23, U.S.C., could not be processed as a CE under the proposed rule. Projects requiring Agency action other than Agency funding may still be eligible for a CE determination under other CEs in sections 771.117 or 771.118.

We are carefully considering all comments received on this issue and hope to publish the final rule soon.

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*UPDATE: The final rule regarding Section 1317 was published in January 2014 and in response to comments, the final rule removes the proposed phrase "that do not require Administration actions other than funding".*

**QUESTION 4:** You have suggested that there was extensive outreach to stakeholders after passage of MAP-21. However, the Inspector General's report suggests that stakeholders noted a lack of "early, interactive communication." How do you respond to stakeholder's criticism and what have you done to improve communication in the year since MAP-21 was signed into law?

RESPONSE: The Department has made considerable outreach efforts related to MAP-21 implementation including web-based and public forums. Additional communication with stakeholders on planned changes is generally prohibited and more communication on environmental requirements would not have provided new information since the provisions were in development over a number of years. The Department continues to provide outreach to stakeholders through public forums and web-based activities.

Senator James Inhofe

**QUESTION 1:** Section 1316 of MAP-21 defines "operational right-of-way" to mean "all real property acquired for the construction, operation, or mitigation of a project," however the proposed rulemaking explains that an operational right-of-way only includes lands "acquired, needed, and used" for transportation purposes. This changes the language of the statute, excluding lands which were "acquired for" transportation use but aren't currently in use. It is my understanding that the Federal Highway Administration received comments about this discrepancy. FHWA - FTA

a. What was the reasoning for not using the definition provided in MAP-21?

RESPONSE: Section 1316 of MAP-21 authorizes a categorical exclusion for projects within the "existing operational right-of-way." Section 1316 also provides a definition for "operational right-of-way" without reference to the word "existing." Thus, we are proposing that an "existing" operational right-of-way refers to those portions of the right-of-way that have been disturbed for an existing transportation facility or are regularly maintained for transportation purposes. In other words, for a project to qualify under this CE, a transportation facility must "exist" in the right-of-way in question.

We are proposing to include the phrase "regularly maintained for a transportation purpose" to emphasize that areas within the facilities footprint that some may not think of as operational (e.g., clear zones, safety and security areas) can, if serving an existing transportation facility, be considered for the CE.

*UPDATE: The final rule regarding Section 1316 was published in January 2014 affirming the agencies interpretation noted above.*

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- b. Will this be corrected in the final rule to accurately reflect the definition Congress provided?**

RESPONSE: We are carefully considering all comments received on this issue and hope to publish the final rule soon.

*UPDATE: The final rule regarding Section 1316 was published in January 2014 affirming the agencies interpretation noted above.*

**QUESTION 2:** Sections 1316 and 1317 of MAP-21 create new existing right of way and limited federal assistance categorical exclusions, eliminating the requirements relating to environmental assessments or impact statements. However, the proposed rulemaking requires Section 1316 categorical exclusions to create documentation for the purpose of proving the absence of unusual circumstances.

- a. Doesn't this new requirement defeat the purpose of creating these new exclusions so as to cut down on the documentation needed for a project? Will this issue be corrected in the final rule?
- b. Also, there is confusion as to whether or not this new documentation will be required for the limited federal assistance exclusion in Section 1317. Will you provide clarification on this issue?

RESPONSE: MAP-21 sections 1316 and 1317 require that these new CEs be consistent with 40 CFR 1508.4. Section 1508.4 requires Federal agencies to take into account "extraordinary circumstances," otherwise referred to as "unusual circumstances" in FHWA and FTA regulations. Currently, consideration and documentation of "unusual circumstances" applies to all CEs addressed in sections 771.117(c) and (d), and 771.118(c) and (d). This proposal for both the "existing right-of-way" and "limited federal assistance" exclusions are consistent with this practice. We are carefully considering all comments received on this issue and hope to publish the final rule soon.

*UPDATE: The final rule regarding Section 1316 and 1317 was published in January 2014 affirming the agencies interpretation noted above.*

**QUESTION 3:** Congress eliminated the ability to flex funds between the HSIP and the behavioral safety programs in MAP - 21. I was very concerned when I read the FHWA guidance on the HSIP and the overly broad interpretation of the HSIP eligibility provisions in MAP - 21 to allow 100% eligibility of HSIP funding for non-infrastructure projects. Due to this broad interpretation states can use any amount of HSIP funding for non-infrastructure projects but they cannot utilize any funding from behavioral programs for infrastructure projects. There is still considerable work to be done on America's roadway safety infrastructure network, with over 34,000 individuals dying, it is critical to ensure that funds that Congress allocated specifically for the HSIP are used appropriately and judiciously to make roads as safe as possible for the motoring public.

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- a. Could you explain the rationale for this broad interpretation? This was not the intent of Congress.

While we understand that it is important to utilize all strategies to reduce fatalities and that stakeholders must work together, infrastructure safety improvements have made major strides in reducing fatalities on our roadways and it is my belief that we need to continue to focus on these strategies. A recent SAIC study found HSIP obligations have provided significant savings to the American public in terms of actual lives saved and the cost to society from roadway fatalities. In fact, the study found that there is a 42: 1 return on investment for safety obligations. The FHWA guidance on HSIP eligibility takes this program in the wrong direction.

RESPONSE: MAP-21 eliminated the 10% cap on States flexing HSIP funds to carry out safety projects under any other section of title 23 and also expanded the eligibility for highway safety improvement projects. In conjunction with the performance focus of the HSIP, the Department interprets these MAP-21 changes as allowing States greater flexibility to choose to fund infrastructure and non-infrastructure safety projects.

FHWA continues to closely monitor the implementation of the HSIP, the purpose of which is to achieve a significant reduction in traffic fatalities and serious injuries on all public roads. The HSIP provides States the flexibility to determine the best projects to achieve this purpose. All HSIP-funded projects—infrastructure or non-infrastructure—must be consistent with a State's SHSP; be based on crash experience, crash potential, crash rate, or other data-supported means; and support a State's safety performance targets.

- b. Would the FHWA consider putting out corrected guidance that would clarify that the HSIP is intended for infrastructure safety projects only?

RESPONSE: The Department has no plans to modify the guidance at this time.

**QUESTION 4:** On June 5, 2012 FMCSA released guidance regarding the application of the 1962 guidance allotting specially trained drivers of commercial motor vehicles specially constructed to service oil wells to record waiting time at a natural gas or oil well site as "off duty" for purposes of calculating hours of service. FMSCA elected not to go through formal rulemaking because the June 5, 2012 guidance was merely a "restatement" of an existing guidance. However, the new guidance states that the notice "revises regulatory guidance to clarify which CMV drivers are subject to the HOS exemptions in 40 CFR 395.1(d)."

- a. Was this simply a restatement or was it a revision?

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**ANSWER:** The June 5, 2012, Federal Register notice was a restatement of the Agency's April 4, 1997, regulatory guidance concerning the applicability of the "Oilfield operations" exceptions in 49 CFR 395.1(d) to the hours-of-service rules, with regard to waiting time.

**b. If it was a revision, why did it not go through formal rule-making?**

**ANSWER:** Generally, agencies may issue regulatory guidance that falls within the scope of the existing regulations without initiating a notice-and-comment rulemaking proceeding. The June 5, 2012, notice was consistent with the regulatory text and restated the Agency's position on the applicability of 49 CFR 395.1(d).

**c. What was the reasoning behind the revision/restatement?**

**ANSWER:** The Agency's restatement was in response to questions from enforcement agencies and the industry concerning the applicability of the oilfield operations exceptions. A significant increase in oil and gas drilling operations in many States resulted in a major increase in CMV traffic to move oilfield equipment, and transport large quantities of supplies, especially water and sand, to the drilling sites. The operators of many of these vehicles and law enforcement officials subsequently raised questions about the applicability of § 395.1(d).

**d. What data/research was conducted to provide the basis for the revision/statement?**

**ANSWER:** The Agency reviewed the rulemaking history that led to the adoption of the oilfield operations exceptions to ensure the original intent of the rulemaking was documented. And the Agency reviewed its previous regulatory guidance on the matter.

**e. Is there any safety data from either before the guidance was issued or since it came out that shows an increase or decrease in incidents directly related to driver fatigue and the use of the oil field exemption?**

**ANSWER:** No data is available at this time. However, the Agency will continue to monitor the safety performance of carriers that identify themselves as operating oilfield equipment.

**f. As a general rule, when an exemption is granted, the applicant must prove that the exemption creates "a level of safety that is equivalent to, or greater than, the level of safety that would be obtained by complying with the regulations." If the June 2012 "regulatory guidance" is not the result of particular safety data, how will the FMCSA determine whether an applicant has met the appropriate standard for granting an exemption?**

**ANSWER:** The oilfield operations provisions under 49 CFR 395.1(d) are exceptions to regulatory requirements established through a notice-and-comment rulemaking process. As such, carriers that meet the criteria may take advantage of the exceptions without demonstrating that their use of the exception would achieve a level of safety comparable to the level of safety that would be achieved by carriers that do not operate under the exception.

By contrast, a motor carrier providing services for the oil or natural gas industry, but that is unable to take advantage of the waiting time exception (49 CFR 395.1(d)(2) concerning waiting time for specially trained drivers operating specially constructed vehicles, may apply for an

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exemption following the procedures under 49 CFR Part 381. That motor carrier would be required to explain how the terms and conditions of its exemption application would achieve a level of safety comparable to the level of safety that would be achieved without the exemption.

*UPDATE: On May 23, 2014, FMCSA published a Federal Register notice announcing that the American Trucking Associations (ATA) applied for an exemption on behalf of motor carriers that provide services for the oil and natural gas industries but that are excluded from the waiting time exception. The Agency will consider the public comments and issue a decision later this year.*

**QUESTION 5:** The original exemption was granted to specially trained drivers of commercial motor vehicles that are specially constructed to service oil wells because the operators spend little time driving the CMVs and typically they have long waiting periods at well sites with few or no functions to perform until their services are needed at an unpredictable point in the drilling process. The June 5 guidance expanded on this and stated that operators of CMVs that are used to transport supplies, equipment, and materials such as sand and water to and from the well sites do not qualify for the "waiting time exception" despite the fact that drivers of these support vehicles are subject to the same periods of uncertainty and are provided the same opportunities to obtain rest and tend to personal necessities during wait time as operators who drive the specially constructed equipment to the well site.

- a. Given that both types of drivers/vehicles experience the same type of delays and opportunities for rest, can FMCSA expand this exception?

ANSWER: Yes. The Agency has the statutory authority to consider a notice-and-comment rulemaking process to expand the current oilfield operations exception. FMCSA has received a petition for rulemaking from the American Trucking Associations and the Agency is reviewing the request to determine whether a rulemaking should be initiated.

- b. Why or why not?

ANSWER: The Agency has the statutory authority to amend the oilfield operations provisions under 49 CFR 395.1(d) and the Agency has the authority to consider applications for exemptions. In the case of rulemaking, the Agency must ensure that it satisfies the provisions of the Motor Carrier Safety Act of 1984 (MCSA or 1984 Act) [49 U.S.C. 31136(a)], as amended by the Moving Ahead for Progress in the 21st Century Act (MAP-21) [Pub. L. 112-141, sec. 32911, 126 Stat. 405, 818, July 6, 2012].

The 1984 Act confers on the Department the authority to regulate drivers, motor carriers, and vehicle equipment.

At a minimum, the regulations shall ensure that — (1) commercial motor vehicles are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to

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operate the vehicles safely; (3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely . . . ; and (4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators [49 U.S.C. 31136(a)].

Section 32911 of MAP-21 enacted a fifth requirement, i.e., that the regulations ensure that “(5) an operator of a commercial motor vehicle is not coerced by a motor carrier, shipper, receiver, or transportation intermediary to operate a commercial motor vehicle in violation of a regulation promulgated under this section, or chapter 51 or chapter 313 of this title” [49 U.S.C. 31136(a)(5)].

With regard to exemptions, the Agency calls attention to 49 CFR part 381, which provides procedures for persons to apply for individual or class exemptions from certain regulations provided the exemption would achieve a level of safety that is equivalent to, or greater than, the level of safety that would be achieved absent the exemption. Therefore, motor carriers that believe the current oilfield operations exceptions would also provide relief sufficient relief for their operations should consider submitting an application for an exemption to the Agency describing an alternative that would ensure the requisite level of safety.

Senator BOXER. Thank you very much. We turn to Hon. Dan Ashe, Director of our Fish and Wildlife Service. Welcome.

**STATEMENT OF HON. DANIEL M. ASHE, DIRECTOR,  
U.S. FISH AND WILDLIFE SERVICE**

Mr. ASHE. Thank you, Chairman Boxer, Ranking Member Vitter and members of the Committee. It is a pleasure to be here today, and thanks for the opportunity to testify and present our views on MAP-21, which of course is the law, and the Fish and Wildlife Service and our employees stand ready to help effectively implement this law and other laws related to delivering infrastructure projects throughout the country.

I think that I would start off by giving kudos to my colleagues at the Department of Transportation. I think they have taken effort to build a good and cooperative relationship with the Fish and Wildlife Service and other resource agencies in the implementation of the MAP-21 provisions. As with the agreement that John Porcari mentioned, the Indiana Bat Multi-State Habitat Conservation Plan, where we see these cooperative efforts being grown up and being supported within the different agencies, and they have worked with the Fish and Wildlife Service to help partner and fund liaison positions between the Fish and Wildlife Service and the Transportation Department, we have seen material efforts and success in expediting these projects.

That is really the importance and the provisions in MAP-21 that focus on early collaboration and trust, communication and respect for one another's mission, I think those are the provisions that really help build success and lasting success. I think our major concern about MAP-21 is really focused on what we like to call the penalty provisions. Because I think those provisions really are the antithesis of building a cooperative relationship. They seem to subordinate the mission and the purpose of natural resource agencies. They are the opposite of building trust and collaboration. They seem to be based on the assumption that transportation project delays are due to the environmental review process.

And at least from the standpoint of the Fish and Wildlife Service, the data don't bear that out. In the Endangered Species Act, Section 7 consultations on transportation projects between 2008 and 2012, our median response date on Section 7 consultations is 69 days. Our median response date on NEPA comments is 12 days.

So I think, again, from our perspective in the U.S. Fish and Wildlife Service, the data don't bear that out. I think it is because the Department of Transportation has built a cooperative relationship with the U.S. Fish and Wildlife Service.

So I think also that these kinds of streamlining provisions, and again, I'm talking here about the penalty type provisions in MAP-21. They haven't been implemented to date, and I hope they don't need to be implemented. But I think if they are, it is because it is a project where there is significant concern and disagreement.

Usually in those cases time is the thing that allows people to come together to reconcile their differences and get a project completed. If we are put on a strict timeline with a financial penalty at the end of that timeline, it is likely to not get to a yes, it is like to get to get to a faster no. Because people simply will not have

the ability to come together using the streamlining and other provisions, and work out their differences. And we have seen that work with regard to potentially very controversial projects.

So I think I will just conclude by saying, my father-in-law was a tradesman, a sheet metal tradesman. He built over his lifetime a very successful business. He helped me a lot and taught me a lot about life and about home improvement. And one of the things that he taught me, and one of the axioms he taught me was, Dan, measure twice, cut once. That I think is something to bear in mind here. When we are dealing with complex, controversial projects, sometimes speed is not what is necessary. Sometimes the investment in time and relationship is the most important thing. I think that we can build success around that.

Thank you very much.

[The prepared statement of Mr. Ashe follows:]

**TESTIMONY OF DAN ASHE, DIRECTOR  
U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR  
BEFORE  
THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS  
ON  
THE IMPLEMENTATION OF MAP-21 SUBTITLE C**

September 18, 2013

**Introduction**

Chairman Boxer, Ranking Member Vitter, and Members of the Committee, I am Dan Ashe, Director of the U.S. Fish and Wildlife Service (Service) within the Department of the Interior (Department). Thank you for the opportunity to testify on the implementation of the Moving Ahead for Progress in the 21<sup>st</sup> Century Act, or MAP-21 (P.L. 112-141), specifically the project delivery provisions. Oversight hearings such as this provide an important opportunity to lay the groundwork for the future reauthorizations of major public works legislation. The Administration strongly supports future reauthorization of a surface transportation proposal that will ensure continued work on critical infrastructure projects, creating jobs and key transportation corridors that benefit the nation's economy and its citizens. The Department looks forward to working with the Congress to ensure that proposed projects and all the environmental review provisions in reauthorization protect the health of the environment and American communities.

The focus of my testimony today is on the opportunity to improve the Federal permitting and review processes, and the role of the Service in that process. We are committed to providing the American people with safe, reliable transportation choices, and there are many reasons those projects take time. Those reasons, such as lack of project funding, local opposition to a project, project complexity, or late changes in project scope, have been noted in reviews conducted by the Congressional Research Service (CRS) on several occasions.<sup>1</sup>

The Service's key interest in MAP-21 and future reauthorizations is ensuring that environmental considerations are addressed early in the process of developing major transportation projects. When this is done effectively, delays and environmental impacts are minimized and overall project costs can be reduced. We believe effective engagement strategies result in mitigation and conservation actions that are coordinated to benefit species and habitat at a larger, landscape level. My testimony will lay out the Service's role in major infrastructure planning and will describe the key provisions in MAP-21 that will take us forward to a more effective and strategic transportation planning process. We will provide some examples of on-the-ground projects and our engagement.

My testimony will also address a section of the legislation where we have considerable concerns. At the Service, we believe Section 1306 may not be the most effective way to achieve Congress' project delivery goals. Fines and a new system of monitoring and certifying planning steps may

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<sup>1</sup> CRS Report R41947, "Accelerating Highway and Transit Project Delivery: Issues and Options for Congress." August 3, 2011; and CRS Report R42479, "The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress." April 11, 2012

also reduce the effectiveness of the existing permitting process. The NEPA-based planning process has produced countless examples of projects being improved, some to the point where the public accepts a project instead of rejecting it. We recommend the Committee reconsider these provisions when undertaking future legislation.

#### **Background of MAP-21**

Subtitle C of MAP-21, also known as the “Project Delivery” section, included several provisions aimed at increasing innovation, efficiency, and accountability in the planning, design, engineering, construction, and financing of transportation projects. Many of these provisions focus on the environmental review and permitting processes associated with project delivery. Several provisions (Sections 1315-1318) require rulemakings for new categorical exclusions under the National Environmental Policy Act (NEPA). Further, Section 1306 creates a dispute resolution process for settling differences between cooperating agencies and includes setting deadlines and imposing a financial penalty for missing deadlines. In addition, MAP-21 has placed a strong emphasis on early coordination between Federal, State, and local agencies. Section 1320 of MAP-21 encourages early coordination activities to avoid delays later in the process, and Section 1311 encourages the development of programmatic mitigation plans to help identify mitigation needs earlier in the transportation planning process to improve future project reviews and target conservation in a more effective manner.

We appreciate the collaborative approach taken by the U.S. Department of Transportation (DOT) in implementing these provisions and the guidance and regulations that have followed enactment of MAP-21. The Federal Highway Administration (FHWA) has been a close partner with the Service in advancing sustainable transportation planning, with particular regard to their innovative landscape-level approach called “Eco-Logical” and their funding support for transportation liaisons – Service biologists – working solely on transportation planning.

#### **The Service Role in Infrastructure Planning**

The Service created field offices across the country in 1946, which are now called Ecological Services field offices. The primary purpose of these offices has always been to provide scientifically sound advice and assistance to other agencies, industries and the public in planning major infrastructure development activities and other projects. At their outset, the majority of this work involved federal water projects, but the work quickly grew to include transportation and energy infrastructure activities. Today, 80 Ecological Services field offices provide expertise in meeting the requirements of numerous federal statutes, including the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), the Clean Water Act section 404 regulations, the Fish and Wildlife Coordination Act, and the Federal Power Act. For transportation projects, the Service collaborates with State Departments of Transportation (State DOTs) and other agencies to identify fish and wildlife resources at risk and ways in which to avoid or lessen those risks, including potential impacts to threatened and endangered species.

The work of the Service’s Ecological Services field offices with other entities generally benefits our nation’s economy and environment. In rare instances, projects present significant impacts to fish and wildlife and very real challenges in mitigating those impacts. However, as a number of

studies<sup>234</sup> have shown, such as the September 2000 Federal Highway Administration's (FHWA) review, most project delays are related to project funding issues, lack of community support, or multiple changes in project design – not environmental reviews.

#### **Development of Programmatic Mitigation Plans (Section 1311)**

Section 1311 of MAP-21 specifically authorizes State DOTs and Metropolitan Planning Organizations (MPOs) to develop programmatic mitigation plans as part of the statewide or local planning process, in order to address the potential environmental impacts of future transportation projects. The Service views this section as beneficial to integrating efficient, strategic conservation into the transportation planning process, particularly at a larger landscape level. In addition, State wildlife agencies are critically important to resource conservation in their States. All States have State Wildlife Action Plans, which among other things, set goals and objectives for wildlife populations and habitats. State DOTs should work closely with their State wildlife agencies as well as the Service to develop programmatic mitigation plans for transportation projects.

The Service's habitat conservation programs have extensive experience in brokering mitigation packages for large-scale projects through their on-the-ground capabilities. The Service has embraced a Strategic Habitat Conservation approach to mitigating the impacts of infrastructure and other development across large biological regions of our landscape. We stand ready to work with DOT on this important endeavor. The example below is a good case study.

#### Programmatic Mitigation Planning: Little Niangua River, Missouri

In order to plan early and address anticipated impacts to streams from ongoing and future road projects proposed for central Missouri, the Missouri Department of Transportation (MoDOT) cooperated with Federal and State agencies to develop a programmatic mitigation bank for wetlands and a threatened fish, the Niangua darter. The Service's Columbia Missouri Field Office had previously established a partnership with the Missouri Department of Conservation aimed at replacing low water crossings (where vehicles drive through the river channel at low water) within the range of the Niangua darter. Early collaboration between these agencies and the MoDOT led to a proposal by MoDOT to replace four consecutive low water crossings with functional culverted crossings in the Little Niangua River. This proactive mitigation created a significant reach of high-value habitat in the Niangua River, free of impacts to the darter, wetlands and other species. The restoration of habitat on the Niangua formed the basis of an aquatic mitigation bank, a habitat conservation area created, preserved or restored to offset the adverse environmental impacts of a proposed project. The bank was approved by an Interagency Review Team sanctioned by the Corps of Engineers and credits for impacts to wetlands and the Niangua darter are now available to help expedite the permitting of current and future Missouri

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<sup>2</sup> CRS Report R42479, "The Role of the Environmental Review Process in Federally Funded Highway Projects." April 11, 2012.

<sup>3</sup> CRS Report R41947, "Accelerating Highway and Transit Project Delivery: Issues and Options for Congress." August 3, 2011.

<sup>4</sup> September 2000 FHWA review of 89 EIS Projects in progress 5 years or more without a ROD

transportation projects. The development of a programmatic mitigation bank, prior to project authorization, has put a vehicle in place to maximize efficiency within project permitting and improve mitigation effectiveness.

#### **Memoranda of Agency Agreements for Early Coordination (Section 1320)**

Section 1320 of MAP-21 established a process for early coordination to avoid project delays, expedite the review process, and provide for better natural resource conservation. Early coordination activities listed in Section 1320 are used to identify potential impacts to natural resources and consider ways to avoid and minimize potential environmental impacts from transportation activities. This early coordination provides for more efficiency as planning efforts are carried into the project delivery and environmental permitting phases. This approach aims to:

1. Improve resource agency understanding of transportation projects at an early planning stage and throughout the project development;
2. Improve the project proponent's understanding of environmental regulatory requirements;
3. Serve the transportation needs of the community;
4. Improve transportation decision-making;
5. Reduce time and costs to implement transportation improvements; and
6. Obtain broader, landscape level conservation.

#### Early Coordination: Floyds Fork Greenway Project

In July 2010, the Kentucky Ecological Services Field Office concluded coordination and ESA consultation with the Federal Highway Administration, Kentucky Transportation Cabinet, and 21st Century Parks (a non-profit organization) on the Floyds Fork Greenway Project. The project is located in Louisville, Jefferson County, Kentucky, and involves the development of multi-use recreational trails, water trails, canoe landings, community parks, natural and cultural resource interpretation areas, and upgrading and expanding infrastructure, including roadways, on approximately 3,860 acres over an 18-mile corridor. The Floyds Fork Greenway Project posed several challenges during the project development and consultation process due to the involvement of both federal and private funds, the complexity of interrelated and interdependent actions, and potential adverse effects on federally listed species. In order to address these challenges, the Kentucky Ecological Services field office provided technical assistance prior to ESA consultation and made recommendations for expediting the consultation process. Early coordination between project proponents and the Kentucky Ecological Services field office resulted in the inclusion of environmental goals and commitments into the project master plan to address several trust resource concerns. To provide for flexibility in project timing and predictability, the project proponents entered into a Conservation Agreement for the Indiana bat, which provided recovery-focused conservation benefits to the species. Early project planning and coordination accelerated the eventual delivery of this complex project by identifying and resolving issues before the permitting phase.

#### **Accelerated Decision-Making (Section 1306)**

Section 1306 of MAP-21 creates a dispute resolution process for settling differences affecting project decisionmaking and the project sponsor and includes a financial penalties provision for failure to make permitting/authorizing decisions by a statutory deadline. Transportation projects affect communities in different ways: some are benign; some can cause significant impacts to neighborhoods, natural resources, historic resources, and/or other values citizens hold dear. The NEPA process is a way to bring consideration of all of those potential impacts into a public forum. Citizens and agencies that care about those resources use the NEPA process to ensure full public disclosure of proposed project impacts and can identify better alternatives.

In 2000, the FHWA conducted a nationwide inquiry (which can be found here: <http://environment.fhwa.dot.gov/stmlng/eisdelay.asp>) into projects for which an environmental impact statement had been in preparation for 5 years or longer. The results of the inquiry indicated that the reasons most frequently associated with project delay were the following: (1) lack of funding or low priority - 32.5% (29/89); (2) local controversy - 16% (14/89) and complex project; or (3) no specific reason - 13% (12/89). Of the 89 projects studied, only 8 percent of projects were delayed due to resource agency review. The majority of delays were caused by the degree of complexity of the project, lack of local support, lack of funding, or low priority – not by environmental reviews.

To that end, in Fiscal Years 2008-2012, the Service concluded 1,669 formal ESA consultations on major transportation and water resource infrastructure projects. Service tracking data shows that approximately 75 percent were concluded during the regulatory time frame of 135 days, with the median number of days needed for completion being approximately 65. The majority of the remaining 25 percent that took longer than the regulatory requirement of 135 days were delayed due to changes in project design that required the applicant and the Service to analyze new information. Not all infrastructure projects require formal ESA consultations, but most require some form of NEPA review. During this same time period, the Service's Ecological Services field offices assisted over 30,000 projects of all kinds by providing technical assistance associated with NEPA reviews. The majority of these reviews were timely and productive, with over 5 million acres of high-value wetlands and uplands conserved in strategic locations across our nation. This is a process that works. However, it is in those rare instances where projects require more time to complete their permits that flexibility, not mandatory deadlines, is a necessity.

Beyond our belief that environmental review is not a primary cause of delay in delivery of transportation projects, the Service is concerned with the language in Section 1306 that sets a 180-day deadline for completing permits or other authorizations for a project. The sufficiency of the information submitted by the lead agency directly impacts the timeliness of the environmental review process. A deadline can only be met if the lead agency fulfills its obligations under NEPA and the lead agency and project sponsor submit sufficient information in a way that consulting and permitting agencies such as the Service can accurately conduct a review and ensure compliance with Federal laws and regulations. DOT is well aware of this need, and is diligently accounting for it as it drafts guidance associated with Section 1306. These requirements mandate an elaborate system of documenting when information arrives, certifying its adequacy and then reporting when an authorization is complete. Another elaborate system of documentation and review is required when a deadline is missed. This process requires staff

time and will lessen already limited resources to get reviews and authorizations completed. Overall, we believe this additional bureaucracy will slow the review process on large projects and result in poorer project outcomes.

Section 1306, seeks to expedite the review process so that transportation will be delivered more quickly. As we work with DOT and other agencies on implementation of section 1306, we are trying to be mindful of potential unintended consequence of this provision, such as the potential to cause resource agencies, such as the Service, to issue preliminary negative responses to requests for authorizations. We still have statutory mandates, such as the ESA, to meet. If we are unable to work with action agencies to devise sound projects that achieve project purposes and meet environmental mandates, we will likely be required to act conservatively and notify action agencies that proposed projects are likely inconsistent with federal statutes. In other words, instead of getting to “yes” faster, we believe these “streamlining” provisions may serve to get to “no” faster. This is contrary to our preference to work with DOT and action agencies to reach an agreement that balances conservation with development. Our goal is to support projects that are well-designed, achieve project purposes, achieve environmental compliance, and are better positioned to withstand judicial review. When complex issues require more time to resolve, the process-forcing mechanisms of Section 1306 in MAP-21 are likely to result in fewer creative solutions and increased litigation.

#### **Status of Implementation of MAP-21 Provisions**

Service representatives have been working closely with DOT officials and representatives of other agencies to implement MAP-21 through the Administration’s Transportation Rapid Response Team (Transportation RRT) coordinated by the Council on Environmental Quality. DOT staff has actively sought Service input and review of MAP-21 Subtitle C implementing policies and regulations. The DOT is developing a guidance document regarding the penalty provisions in Section 1306 and is considering the comments provided by resources agencies, including the Service. The Service appreciates the collaborative approach taken by DOT on MAP-21 implementation, and we will work closely with the DOT and FHWA on proposed regulations and guidance needed to implement Subtitle C provisions.

#### **Conclusion**

The Service supports what we believe is a more effective approach to accomplishing the objectives of Subtitle C in MAP-21. The Service is supportive of measures that increase efficiency, facilitate early coordination, and balance economic interests with conservation. By contrast, we have considerable concerns with fines and a new system of monitoring and certifying planning steps which may work contrary to Congress’ intent. We look forward to working with the Committee and others as we move forward to implement the provisions of MAP-21.

Thank you, Chairman, for the opportunity to testify on behalf of the Service. I am happy to answer any questions you may have.

**Environment and Public Works Committee Hearing****September 18, 2013****Follow-Up Questions for Written Submission**Questions for AsheSenator Barbara Boxer

**Question 1.** Director Ashe, MAP-21 and the Water Resources Development Act require the action agency to receive the concurrence of resource agencies in setting deadlines for environmental review.

**Do you agree that the requirement that resource agencies concur with project review timelines is important? If so, please describe why it is important to require action agencies to get the concurrence of resource agencies in the environmental review process?**

**Response:** Yes, it is imperative that resource agencies are afforded the opportunity to weigh in on project timing decisions. Resource agencies, like the U.S. Fish and Wildlife Service, must prioritize funding and workloads in order to meet transportation and water project deadlines. Having those parameters considered in the development of a timeline for a project up front will allow resource agencies to plan for these projects and meet deadlines.

**Question 2.** Director Ashe, you mentioned multiple times in your testimony the benefits of early coordination in the transportation planning process. Could you elaborate on how the Fish and Wildlife Service, particularly your field offices, works with project sponsors early in the planning and project development phases to identify, lessen, or mitigate adverse environmental impacts?

**Response:** A number of agencies, including the U.S. Fish and Wildlife Service, play a critical role in achieving the goals of the transportation industry. Resource and other partner agencies coordinate with state and local transportation agencies during planning to identify and consider ways to avoid and minimize potential environmental impacts from transportation activities. This early coordination helps improve decision-making. Early communication and collaboration within and among transportation and resource agencies links transportation planning efforts with project development and permitting processes, making the process more efficient. This approach aims to:

1. Improve resource agency understanding of transportation projects at an early planning stage and throughout the project development.
2. Improve the project proponent's understanding of environmental regulatory requirements.
3. Serve the transportation needs of the community.
4. Improve transportation decision-making.
5. Reduce time and costs to implement transportation improvements.
6. Obtain broader, landscape level conservation.

The Service encourages early and sustained involvement with transportation agencies by supporting programmatic mitigation plans, programmatic ESA Section 7 consultation, and reimbursable funding agreements for transportation activities. A few examples of successful early coordination between resource and transportation agencies are provided below.

**State Route 79 Realignment Project**

Through early coordination under the NEPA / 404 MOU coordination process, the State Route 79 Realignment Project Resource Agency Group (Resource Agency Group) identified an innovative solution that avoided an ecologically significant vernal pool region while still providing for transportation needs. At the beginning of the coordination process, the locally preferred alternative (i.e. Central Alignment) to realign a 19-mile stretch of roadway would have resulted in severe impacts to the Salt Creek Plain, which is arguably the most significant remaining vernal pool area in Riverside County due to its high diversity, large size, and abundance of rare and endemic species, including five federally listed species. The Central Alignment would have bisected the Salt Creek Plain, altering the hydrologic regime upon which the vernal pool habitat depends. By working together early in the planning and project development process, the Resource Agency Group (Federal Highway Administration, California Department of Transportation, U.S. Environmental Protection Agency, U.S. Army Corps of Engineers, and U.S. Fish and Wildlife Service (Carlsbad Fish and Wildlife Office)) along with representatives from the Riverside County Transportation Commission, their consultant CH2M HILL, and the City of Hemet) were able to identify a mutually agreed upon alternate road alignment that avoids the Salt Creek Plain, satisfies the transportation need, and will facilitate the identification of the least environmentally damaging practicable alternative for the purposes of NEPA and Clean Water Act permitting. In addition, recently submitted draft environmental technical reports thoroughly address wildlife connectivity in an effort to protect critical ecosystem functions through the incorporation of numerous new bridges and culverts. The project was selected, from a very competitive field of nominees, as the winning recipient of the U.S. Fish and Wildlife Service's 2010 Transportation Environmental Stewardship Excellence Award.

**Floyds Fork Greenway Project**

In July 2010, the Kentucky Ecological Services Field Office (Kentucky ESFO) concluded coordination and ESA consultation with the Federal Highway Administration (FHWA), Kentucky Transportation Cabinet (KYTC), and 21st Century Parks (a 501(c)(3) non-profit organization) on the Floyds Fork Greenway Project. The project is located in Louisville, Jefferson County, Kentucky and involves the development of multi-use recreational trails, water trails, canoe landings, community parks, natural and cultural resource interpretation areas, and connecting infrastructure on approximately 3,860 acres over an 18-mile corridor. The Floyds Fork Greenway Project posed several challenges during the project development and consultation process due to the involvement of both federal and private funds, the complexity of interrelated and interdependent actions, and potential adverse affects on federally listed species. In order to address these challenges, the Kentucky ESFO provided technical assistance prior to ESA consultation and made recommendations for streamlining the consultation process. Early coordination between project proponents and the Kentucky ESFO resulted in the inclusion of environmental goals and commitments into the project master plan to address several trust resource concerns. To provide for flexibility in project timing and predictability, the project proponents entered into a Conservation Agreement for the Indiana bat, which provided recovery-focused conservation benefits to the species.

**Early Planning and Advanced Mitigation; Little Niangua River, Missouri**

In order to plan early and address anticipated impacts to streams from ongoing and future road projects proposed for central Missouri, the State Department of Transportation (MoDOT) coordinated with Federal and State agencies to develop advanced mitigation banks for wetlands and listed species. The Service's Columbia Missouri Field Office had previously established a partnership with the Columbia National Fish and Wildlife Conservation Office and the Missouri Department of Conservation to replace low water

crossings within the range of the threatened Niangua darter in the Ozarks. Early communication and coordination amongst these organizations and the transportation agency led to a proposal by MoDOT to replace four consecutive low water crossings in the Little Niangua River to act as an aquatic mitigation bank for future transportation projects. The Federal and State agencies collaborated with MoDOT to determine a credit value on replacing 4 low water crossings, and the bank was approved by the Interagency Review Team as compensatory mitigation for future MoDOT project impacts to wetlands and the threatened Niangua darter. This early coordination among resource and transportation agencies was a significant factor in linking early planning and advanced mitigation to project delivery.

**Senator Sheldon Whitehouse**

**Question 1.** Lead agencies may establish a schedule for completion of the environmental review process "after consultation with and concurrence of each participating agency...." 23 U.S.C. 139(g)(B). With respect to the dispute resolution process established in MAP-21, a lead agency is required to consult with relevant agencies, but their concurrence appears not to be required by statute in all cases.

**Deadlines.** The deadlines referred to in subparagraph (A) shall be those established under subsection (g), or any other deadlines established by the lead agency, in consultation with the project sponsor and other relevant agencies. 23 U.S.C. § 139(h)(4)(B), as amended by MAP-21 Section 1306 (emphasis added).

Is it your interpretation of this provision that a lead agency need not seek the concurrence of the project sponsor and other relevant agencies to set deadlines subject to dispute resolution? If so, under what circumstances in which a lead agency may set a deadline without agreement of the project sponsor and relevant agencies? What are examples of the types of deadlines that may be set in those circumstances?

**Response:** Yes, with regard to dispute resolution, it is our understanding that the lead agency does not need to secure concurrence from other agencies or the project sponsor when setting deadlines (only consultation is required). We do not see this as a major issue. In practice, this happens only rarely and when it does, lead and participating agencies typically sit down and discuss what is reasonable in terms of collecting information and preparing for dispute resolution talks. The deadlines referenced are normally either dates for meetings or the preparation of reports.

**SEC. 1306. ACCELERATED DECISIONMAKING—**Section 139(h) of title 23, United States Code, is amended by striking paragraph (4) and inserting the following:

*"(4) Interim decision on achieving accelerated decision making*

*"(B) Deadlines—The deadlines referred to in subparagraph (A) shall be those established under subsection (g), or any other deadlines established by the lead agency, in consultation with the project sponsor and other relevant agencies.*

**Senator James Inhofe**

**Question 1.** The Endangered Species Act (ESA) has rigid procedural deadlines that force the Fish and Wildlife Service (Service) to make decisions about whether to list species as endangered or threatened once petitioned. Often, the service does not have sufficient resources to consider all of the data, conservation agreements, alternative science, or other factors when operating within the statutory deadlines. This has become particularly evident since the Service's funding level has been reduced in recent years. In light of this, are you open to the statutory timelines in the ESA being extended to provide the Service with more time and discretion to make decisions required by the Act?

**Response:** The statutory deadlines for petition findings, listing determinations, and critical habitat designations are achievable, and we have worked within these timeframes successfully for over 30 years. We consider them appropriate for determining whether to extend the protections of the Act to species that are in trouble. Timing constraints are most often due to conservation efforts or research being initiated late in the process, in response to a proposed listing determination, as opposed to early and proactive work upon the determination of a species as a candidate for listing. The more stable and predictable work planning in recent years is helping to address that problem.

**Question 2.** The ESA also has a number of terms governing the Service's listing decisions that are not well defined. This often results in the Service being subjected to significant litigation risk. Such terms include, among other things, "in the foreseeable future," and "best scientific and commercial data available." Would you be open to these definitions being clarified to more clearly establish what the Service's obligations are under the Act?

**Response:** We consider the interpretation of those terms or phrases to be appropriately within the administrative authority of the implementing agencies, consistent with Congressional intent. We have interpreted these and other terms and phrases in a manner that reflects the range of circumstances in which they must be applied, and we will continue to do so as needed. We consider this approach to be the most effective way to proceed in interpreting and implementing the Act.

**Question 3.** 16 U.S.C. 1533(f) states that recovery plans must be developed by the Service for listed species that, once met, "would result in a determination, in accordance with the provisions of this section, that the species be removed from the list;" however, the Statute does not mandate that the Service make such a determination at that time. Would you support an amendment to the statute that would require the Service to make delisting decisions once a recovery plan has been implemented and the "objective, measurable criteria" in the plan have been met?

**Response:** Recovery plans are advisory, not action forcing, and we consider it most appropriate that they remain so. While recovery plans significantly inform our decision on whether to delist a species, the decision is fundamentally based on whether the species still meets the definitions of a threatened or endangered species, considering the five factors set forth in the statute. We assess the status of species in our five year reviews and then move forward to reclassify or delist as appropriate. We consider this approach to be the most flexible and effective means to determine whether a species warrants delisting.

Senator BOXER. Thank you.  
The Honorable Nancy Sutley, Chair, Council on Environmental Quality. Welcome.

**STATEMENT OF HON. NANCY SUTLEY, CHAIR, COUNCIL ON ENVIRONMENTAL QUALITY**

Ms. SUTLEY. Thank you, Chairman Boxer, Ranking Member Vitter and members of the Committee. Thank you for the opportunity to discuss the Administration's efforts to implement MAP-21.

We take seriously the development of our Nation's transportation infrastructure to improve the mobility of our communities and to foster economic growth.

I would like to discuss the Administration's broader efforts to expedite permitting of infrastructure projects and the importance of NEPA. NEPA serves an important purpose by giving communities the opportunity for input into Federal decisions that affect them and ensuring that those decisions are informed by good analysis of project impacts. Better agency collaboration, as you noted, Madam Chair, combined with good guidance to efficiently implement existing authority leads to better outcomes for project applicants, for communities, a healthier environment and savings for the taxpayers.

Under this Administration, CEQ has focused on increasing efficiency and infrastructure permitting, and identifying new areas to improve the performance of the Federal Government, including by establishing interagency rapid response teams to expedite key projects and by issuing new guidance to improve the overall NEPA process.

I think today sometimes we take for granted that the public has a right to participate in Federal decisions. But in fact, it was in NEPA that Congress and the President clearly established this right. Before NEPA, there was little to prevent the Federal Government from simply ignoring the environmental concerns of affected communities. At its heart, NEPA recognizes that we need to look before we leap into making a decision and that the public, business, tribes and State and local governments all have a vital interest in Federal actions. Their unique knowledge of the risks, consequences and possible alternatives to a project can produce better decisions. And better decisions reduce the risk of future litigation and further delay.

A few facts about NEPA: More than 90 percent of all Federal actions are quickly handled through categorical exclusions, the least intensive form of NEPA review. And only a very small fraction of projects or decisions require a full environmental impact statement.

Since today's hearing is focused on MAP-21, I wanted to provide you with some facts about transportation projects and the NEPA process. The Federal Highway Administration estimates that annually about 9,700 projects are covered by categorical exclusions, 130 use environmental assessments and just 30 projects, or .3 percent of the projects, require a full EIS. And the Federal Transit Administration reports very similar percentages.

Many challenges, as you heard, in major project development are often, we believe, incorrectly attributed to the NEPA process. Se-

curing funding, local opposition, project complexity or changes in scope are more often responsible for delays.

Major projects often require permits and reviews that cut across many agencies and jurisdictions. Under a March 2012 executive order, CEQ is working closely with OMB and Federal agencies to speed the review process. Efforts to modernize infrastructure permitting provide important lessons for enhancing the efficiency of permitting processes overall and maintaining the integrity of NEPA. Bringing agencies, project applicants and stakeholders to the table at the beginning of the process saves time and money. Establishing mutually agreed-upon project schedules rather than arbitrary deadlines fosters coordination that saves time and money. Concurrent and collaborative reviews, as has already been noted, across Federal agencies and with other stakeholders saves time and money. And making this information available to the public through Project Dashboard provides transparency and accountability.

As a result of this work, we have been able to improve permitting timelines by several months to several years and improve environmental and community outcomes.

Infrastructure continues to be a priority for the Administration. In May, the President issued a Presidential memorandum that called on agencies to cut Federal permitting timelines for major infrastructure projects by up to 50 percent.

We are eager to work with Congress to identify ways to expedite transportation project permitting in a manner that protects public input and the environment. There are many commendable provisions in MAP-21. But we share the concern about financial penalties on agencies; arbitrary deadlines are meant to permit projects more quickly. In our view, these efforts can be counterproductive and may slow project approval and increase litigation risk. We are committed to working with Congress to focus our efforts on what works and get to the root causes of project delays.

Again, I appreciate the opportunity to appear before you and look forward to answering your questions. Thank you.

[The prepared statement of Ms. Sutley follows:]

**Testimony of Nancy H. Sutley  
Council on Environmental Quality  
Before the  
Committee on Environment and Public Works  
MAP-21 Implementation Hearing  
September 18, 2013**

Chairman Boxer, Ranking Member Vitter, and Members of the Committee, thank you for the opportunity to discuss the Administration's efforts to implement the Moving Ahead for Progress in the 21st Century Act or, as it is commonly known, "MAP-21." As you know, the Administration takes seriously the development of the Nation's transportation infrastructure in order to improve the mobility of our communities and foster economic growth and I am pleased to be here today to talk about our efforts in implementing MAP-21.

Implementation of MAP-21 is being led by the Department of Transportation (DOT) with the cooperation of our natural resource agencies, such as the Department of Interior (DOI). I will let them speak today on the specifics of implementing the law and use my time to talk about the Administration's broader efforts to expedite permitting of critical infrastructure projects and the importance of the National Environmental Policy Act (NEPA). CEQ maintains its statutory role of overseeing agency implementation of NEPA.

One of the key areas of focus for the Administration is cutting red tape to help businesses grow and improve the transportation options and mobility of the Nation. We support NEPA's goals of giving communities the opportunity for input into Federal decisions that affect them and ensuring that those decisions are informed by good analysis of alternatives and project impacts. CEQ advances those goals by working to avoid redundancy and conflict in the environmental review process, and by fostering an efficient, cohesive environmental policy. A great example of this is our handbook on coordinating NEPA and the California Environmental Quality Act (CEQA), one of the most robust state environmental laws in the country. The handbook is intended to help in the development of a single environmental review process that can meet the requirements of both statutes.

We believe that better agency collaboration and coordination, combined with good guidance to implement existing authorities and missions in an efficient manner, leads to better outcomes for those doing business with the Federal government and communities affected by Federal decisions, as well as a healthier environment and savings for the taxpayer.

Under this Administration, CEQ has been focused consistently on increasing efficiency in Federal processes, including infrastructure permitting, and identifying new areas to improve the performance of the Federal government. American taxpayers expect and deserve nothing less.

### **The Importance of the National Environmental Policy Act**

I'd like to offer a few words about the importance of NEPA, because I think it provides important context given our discussion about Federal permitting for transportation projects.

Today, I think we take for granted that the public has a right to participate in Federal decisions regarding the environment, energy and natural resources, but in fact it was in NEPA that Congress and the President clearly established this right. It wasn't that long ago that the public had little voice in the Federal decisionmaking process regarding all aspects of the human environment, which includes the social and economic aspects of Federal decisions, for projects that affected them. Prior to NEPA and Federal agencies beginning to embrace environmental stewardship, dams displaced Tribes or water projects harmed important ecosystems. Our country is still addressing such impacts decades later for some of these projects. Before NEPA, there were limited opportunities for preventing the Federal Government from ignoring the environmental concerns of affected communities. It is also important to remember that the House of Representatives approved NEPA by a vote of 372 to 15 and that the Senate passed NEPA by voice vote without any recorded dissent.

NEPA democratized the Federal decisionmaking process and instilled accountability in Federal actions by formally including environmental considerations and public input into Federal decisions. Today, it is NEPA that ensures the ability of the public, communities, State and local governments and industry to have a seat at the table when Federal agencies make decisions that impact our communities and the environment.

As eight of my predecessors at CEQ from both Republican and Democratic administrations noted to Congress a few years ago,

“Consideration of the impacts of proposed government actions on the quality of the human environment is essential to responsible government decision-making. Government projects and programs have effects on the environment with important consequences for every American, and those impacts should be carefully weighed by public officials before taking action. Environmental impact analysis is thus not an impediment to responsible government action; it is a prerequisite for it.”<sup>1</sup>

At its heart, NEPA recognizes that we need to look before we leap into making a decision and that citizens, communities, local and State governments, Indian tribes, and businesses all have a vital interest in government actions. And, more often than not, their unique knowledge of the risks, consequences, and possible alternatives to a proposed project can produce better decisions. And better decisions reduce the risk of future litigation and project delays, which is a shared goal of the Congress and this Administration.

A few facts about NEPA:

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<sup>1</sup> Letter to Rep. Cathy McMorris, Chair of the Task Force on Improving the National Environmental Policy Act. September 19, 2005. Signed by former Chairs and General Counsels of CEQ.

- More than 90% of all Federal actions are quickly handled through categorical exclusions, the least intensive form of NEPA review.
- Only a very small fraction of projects or decisions require a full Environmental Impact Statement (EIS), the most time intensive NEPA review. In the case of the 275,000 projects funded under the Recovery Act, only 841 projects (or 0.44%) required a full EIS. 96% of all Recovery Act projects used categorical exclusions.
- Each year, Federal agencies conduct hundreds of thousands of actions, yet the amount of litigation on these is relatively small. Between 2001 and 2011, no more than 175 NEPA cases were filed each year – with fewer than 100 cases filed during several of those years including 2010 and 2011.

#### **NEPA and Surface Transportation Projects**

Since today's hearing is focused on MAP-21 implementation and the permitting of surface transportation projects, I want to provide this Committee with some important facts about these types of projects and the NEPA process. I would note for the Committee that CEQ and DOT developed principles on the implementation of MAP-21. A copy of those principles is attached with my written testimony.

The Federal Highway Administration (FHWA) estimates that, annually, about 9,700 projects are covered by CEs, which involve no significant environmental impacts and, hence, require limited documentation, analysis, or review under NEPA. Approximately 130 EAs are processed by FHWA in a year, which can take just a couple of months to complete, and 30 projects require a full EIS, the most rigorous form of NEPA analysis. Of the projects completed each year, it is estimated that 98% are CEs, 1.7% are EAs and only 0.3% are EISs.

In 2011 and 2012<sup>2</sup>, the Congressional Research Service (CRS) found in its analysis of transportation project delivery that, “The overwhelming majority of highway projects are deemed to have no significant impact on the environment and require no or limited environmental review or documentation under NEPA.”<sup>3</sup>

For the Federal Transit Administration (FTA), the majority of FTA projects fall within the CE class of action. Of the projects completed per year (2010-2012), FTA estimates that on average per year approximately 3,000 projects (99%) were classified as CEs, 20 projects were (0.6%) were processed as EAs, and 5 projects (0.2%) were processed as EISs.

In our conversations with these agencies, they confirm CRS' findings. While it can be true that litigation over NEPA documents or an overly detailed NEPA process due to the fear of litigation may result in project delays, many other realities of major project development often are incorrectly attributed to the NEPA process. Challenges such as securing project funding, low priority, local opposition to a project, project complexity, or changes in project scope are more

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<sup>2</sup> CRS Report R42479, “The Role of the Environmental Review Process in Federally Funded Highway Projects.” April 11, 2012.

<sup>3</sup> CRS Report R41947, “Accelerating Highway and Transit Project Delivery: Issues and Options for Congress.” August 3, 2011.

often responsible for delays in building projects. However, because these issues are frequently identified during the NEPA process, NEPA itself is often targeted as the culprit.

It's also important to bear in mind that some State and local jurisdictions have their own permitting processes, which can and do add time or delay to federally funded projects, in some cases at the request of State and local officials. And States and local communities often vary in their available resources, both in staff and funding, and levels of sophistication to permit challenging projects.

We all want to see the permitting of critical transportation projects – from highways and bridges, to bike paths, streetcars, and intermodal facilities – built in an expeditious and timely manner. However, we should focus on the most common causes of delay.

#### **The Administration's Efforts on Federal Permitting and Infrastructure Projects**

With some basic facts out of the way, I'd like to speak about our efforts within the Administration to cut red-tape for infrastructure projects. Major infrastructure projects typically require multiple permits and reviews from multiple agencies across multiple jurisdictions, at times leading to confusion, duplication, and delay. CEQ is working closely with the Office of Management and Budget (OMB) and Federal agencies to address these concerns with the goal of saving time by enhancing efficiencies in the review processes of major infrastructure projects, without sacrificing the important protections for communities and the environment embedded in our laws. We've worked hard to maintain the fundamental precept of NEPA, which is ensuring the ability of the public, communities, State, local and tribal governments, environmental organizations and industry to have a seat at the table when agencies are making decisions, while at the same time identifying steps to cut time and save money. Moreover, NEPA ensures that Federal agencies consider environmental consequences of proposed major actions; we take this obligation very seriously as we seek to build critical infrastructure that creates jobs and ensures America's competitiveness in the future.

We believe our work on modernizing infrastructure permitting can serve as a model for maintaining the integrity of NEPA while finding efficiencies across the Federal government to enhance our review and permitting processes for major infrastructure projects and improving outcomes for the environment and communities.

For example, the Los Angeles County Metropolitan Transportation Authority's (LACMTA) \$2.058 billion Crenshaw/LAX Transit Corridor project is a good example of our permitting modernization efforts. The project was one of the FTA's first projects piloting a new streamlined risk assessment process that helped identify and mitigate project risks more efficiently. Through the project review process, the LACMTA determined that a five-mile stretch of the project could utilize a rarely-used existing freight rail line corridor. The freight railroad executed an agreement and obtained a regulatory exemption to abandon the line and allow LACMTA to use it. That decision decreased project costs, saved time and reduced disturbances for the nearby community by using existing right-of-way.

The Tappan Zee Bridge Replacement project in Westchester County, New York is another good example of our progress. The bridge serves about 138,000 vehicles a day, and represents a vital link in the regional and national transportation network. Similarly large and complex projects can require as many as four years or more for review, but through a coordinated effort by numerous State and Federal agencies, the project team was able to set an aggressive schedule and completed the Federal permitting and review process in 1.5 years, saving up to three years on the timeline of a multi-billion project that will create an estimated 45,000 jobs.

Furthermore, FHWA has had an “Every Day Counts” (EDC) initiative in place for several years. EDC is aimed at accelerating the delivery of transportation projects without compromising the quality of the environment. Many good ideas and best practices have been identified and shared to date.

We’ve already learned from our infrastructure permitting work that:

- Bringing agencies, project applicants and stakeholders to the table at the beginning of the process saves time and money – early project development work involving affected resource agencies often avoids or minimizes potential conflicts over routing and impacts on natural resources.
- Establishing mutually agreed-to project milestones and target schedules – not arbitrary deadlines – for complex or significant projects fosters a coordinated process that saves time and money.
- Concurrent, coordinated, and collaborative– rather than isolated and sequential – reviews across Federal agencies and with States, Indian tribes and local government saves time and money.
- Using information technology tools, like GIS tools that make relevant scientific and environmental data easily accessible to project applicants and facilitate good project siting or project dashboards that make timelines and milestones public on the Internet, along with key project information and status, increases transparency and helps to save time and money.

In March of 2012, the President issued an Executive Order<sup>4</sup> directing Federal agencies to expedite permitting and review decisions for infrastructure projects. We can now show that these efforts have helped to improve permitting timelines by several months to several years, while at the same time improving environmental and community outcomes. You can track the results of specific projects on the Administration’s Infrastructure Permitting Dashboard,<sup>5</sup> which provides an unprecedented level of transparency into the Federal permitting and review processes.

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<sup>4</sup>Executive Order 13604 – “Improving Performance of Federal Permitting and Review of Infrastructure Projects.” March 22, 2012. <http://www.whitehouse.gov/the-press-office/2012/03/22/executive-order-improving-performance-federal-permitting-and-review-infr>.

<sup>5</sup> Federal Infrastructure Projects Permitting Dashboard: <http://www.permits.performance.gov/>.

We are also setting new goals based on this progress. In May 2013, the President signed a Presidential Memorandum<sup>6</sup> that takes the next step by calling on agencies to institutionalize the time-and cost-saving tactics identified over the past year and setting a goal of cutting aggregate Federal permitting timelines for major infrastructure projects of up to 50 percent. These best practices range from expanding use of information technology to cut paperwork and provide agencies with better information faster, to making time-saving collaboration the norm. For example, by having multiple agencies review a project at the same time, instead of one after the other. We are also seeking to apply some of these same principles in our Hurricane Sandy recovery work.

We are collaborating with Federal agencies and working hard to meet this goal to adequately address our infrastructure needs, ensure sound decisions, and navigate the difficult fiscal climate.

### **Conclusion**

As this Committee oversees the implementation of MAP-21 and considers reauthorization of our surface transportation programs, we are eager to work with you to identify ways to expedite the permitting of transportation project in a manner that protects public input and the environment in Federal decisionmaking.

We are, however, concerned with attempts to impose financial penalties on already cash-strapped agencies or arbitrary deadlines as a means to permit projects more quickly. In our view, these efforts are counterproductive and may actually slow project approval. Moreover, they could constrain science-based decision making, increase litigation risk, and undermine the integrity of several foundational environmental laws, including the Clean Water Act, the Endangered Species Act, and NEPA.

In our experience, early coordination and collaboration with Agencies and projects sponsors is key to expediting projects. Just as important is the setting of mutually agreed to timelines and project milestones – not statutory deadlines - between Federal agencies, State and local governments, and project sponsors. Finally, making this information available to the public through project dashboards provides transparency and accountability to the public and project proponents.

I would urge Congress to work with us in the Administration to focus our efforts on what actually works and getting at the root causes of project delay. It is these efforts that will encourage expediency in the permitting process, protect our communities and ensure the public has a voice in the process.

In closing, I am proud of what we have accomplished over the past four and a half years, and I am looking forward to continuing our progress this year. The permitting efforts I've described represent just a few of the many steps we have taken within CEQ and the Administration to

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<sup>6</sup> Presidential Memorandum – “Modernizing Federal Infrastructure Review and Permitting Regulations, Policies, and Procedures.” May 17, 2013. <http://www.whitehouse.gov/the-press-office/2013/05/17/presidential-memorandum-modernizing-federal-infrastructure-review-and-pe>.

transform the way we do business by promoting efficiency and speed in the delivery of projects that create jobs, engaging the public in decisions, and protecting the health of American communities.

I appreciate the opportunity to appear before you this morning and look forward to answering your questions.



THE SECRETARY OF TRANSPORTATION  
WASHINGTON, D.C. 20590

December 19, 2012

The Honorable Nancy Sutley  
Chairwoman  
White House Council on Environmental Quality  
722 Jackson Place, NW  
Washington, DC 20503

Dear Chairwoman Sutley:

Congress recently passed a new surface transportation authorization bill known as the Moving Ahead for Progress in the 21st Century Act (MAP-21). This law provides new tools that are intended to improve project delivery by enabling the U.S. Department of Transportation (DOT) and its modal agencies, other Federal departments and agencies, and the States to expedite important infrastructure projects without sacrificing quality.

As the President has recognized in Executive Order 13604, entitled *Improving Performance of Federal Permitting and Review of Infrastructure Projects* (March 22, 2012), our Federal permitting and review processes must provide a transparent, consistent, and predictable path for both project sponsors and affected communities. Our goal in implementing this law and this Administration's permitting reforms is to provide demonstrable improvements in the performance of Federal infrastructure permitting and review processes, including more timely and efficient decisions. Most importantly, we seek to use the environmental review process to deliver better and more sustainable projects that result in a healthier and cleaner environment.

In implementing this law, we will adhere to the following principles:

- (1) DOT will implement MAP-21 in a way that utilizes the National Environmental Policy Act and other Federal environmental statutes to promote better environmental outcomes, improve transparency, and support informed decisionmaking.
- (2) DOT will promote environmental stewardship, transparency, and early inter-agency consultation and collaboration as it carries out all of the new mandates included in MAP-21.
- (3) DOT will encourage early collaboration among agencies, project sponsors, affected stakeholders and the public, both in the transportation planning process and in project development, to avoid adverse impacts to communities and the environment, minimize or mitigate impacts that may occur, and avoid project delay.
- (4) For greater transparency and accountability, DOT will utilize cost-effective information technology to collect and disseminate information about individual projects and agency performance and to fully consider the priorities and concerns of affected communities.
- (5) In developing schedules for projects, DOT will ensure that the timing for decisionmaking regarding any required actions, such as permits and licenses, must be consistent with applicable regulations governing coordinating with cooperating agencies.

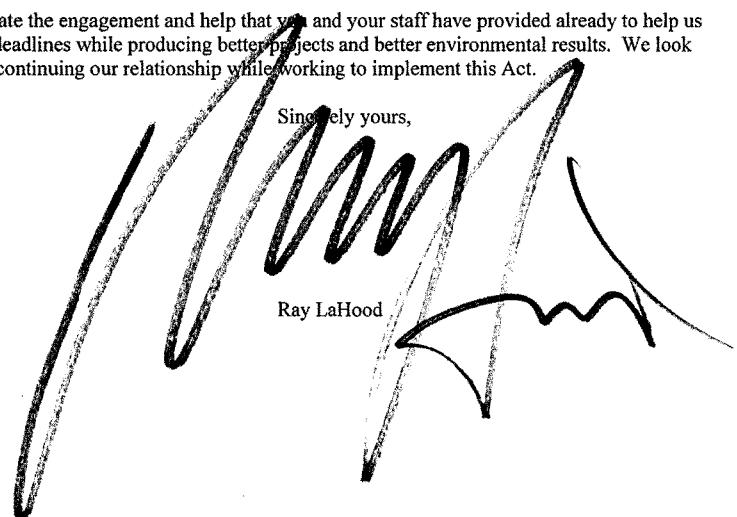
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The Honorable Nancy Sutley

- (6) DOT will encourage planning and project development procedures that avoid disputes and resolve any that do arise early in the process, thus preventing unnecessary elevation wherever possible.

We appreciate the engagement and help that you and your staff have provided already to help us meet tight deadlines while producing better projects and better environmental results. We look forward to continuing our relationship while working to implement this Act.

Sincerely yours,

Ray LaHood



**Questions from: Senator Barbara Boxer**

1. Chairwoman Sutley, your testimony highlighted the importance of establishing mutually agreed to project milestones and schedules and noted that this approach fosters a coordinated process that saves time and money. MAP-21 requires action agencies to receive concurrence from resource agencies in establishing time lines for environmental review of projects.

The statute establishes a process of bringing agencies together to establish agreed upon time lines for review. Do you believe that improving coordination will help achieve more efficient decision-making?

- A. Yes. Improved coordination will certainly result in more efficient decision-making in terms of schedule and cost, and will achieve better decisions at the same time. As my testimony noted, “we believe that better agency collaboration and coordination, combined with good guidance to implement existing authorities and missions in an efficient manner, leads to better outcomes for those doing business with the Federal government and communities affected by Federal decisions, as well as a healthier environment and savings for the taxpayer.” The Council on Environmental Quality (CEQ) is engaged in numerous activities working toward that end. In conjunction with the Department of Transportation (DOT), the Office of Management and Budget (OMB), and others, we are in the process of establishing the Interagency Infrastructure Permitting and Improvement Team (IIPIT) as proposed in the President’s FY 15 Budget. Such a team would facilitate permitting and review of 21<sup>st</sup> Century infrastructure, facilitate interagency coordination, engage non-Federal parties where appropriate, and continue to promote efforts to produce measurably better outcomes for communities and the environment. There is merit to receiving concurrence from a resource agency in establishing time lines for environmental review of projects when the NEPA analysis prepared by DOT must be used to satisfy the legal requirements of that resource agency.

Improving coordination of Federal and state entities is another area of focus for CEQ. We continue working with states to develop a cross-walk of the Federal NEPA process with state environmental review processes similar to NEPA. We continue to pursue our long-term goal of reviewing state environmental review processes, identifying the commonalities and differences between them and NEPA, and exploring ways to effectively prepare coordinated environmental reviews that address the differences early to reduce redundant elements of the processes and improve overall coordination and efficiency. In the case of California, we have developed the *NEPA-CEQA Handbook* that takes a detailed look at how the Federal and state environmental review processes work together.

2. Chairwoman Sutley, you mention a number of steps the Administration is taking to accelerate major projects, through efforts from the Every Day Counts Initiative to the Infrastructure Permitting Dashboard.

Do you believe that codifying some of the existing actions, such as was done in MAP-21, will help institutionalize the steps that State and Federal agencies can take to speed up projects? If so, please provide some examples of additional process improvements that could be codified?

- A. Several of the environmental provisions of MAP-21 can benefit other Federal agencies and facilitate more efficient environmental review. For example, CEQ has prepared draft Programmatic NEPA Guidance to help Federal agencies utilize a programmatic approach to NEPA environmental reviews. This is consistent with MAP-21 Section 1305(a) provision on

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programmatics. Our draft guidance has been distributed to agency NEPA contacts for preliminary input, and we anticipate a public review and comment period for the Programmatic NEPA Guidance in the spring of 2014.

CEQ and DOT co-convene the Transportation Rapid Response Team (TRRT) which has helped coordinate MAP-21 implementation and support the work of the Administration in expediting Federal decisions on permitting and environmental reviews for transportation infrastructure proposals. The interagency TRRT has identified the value of legislation allowing the use of planning funds by Federal, state, and tribal governmental agencies for efforts directly related to expediting and improving project development, planning, reviews, permitting, and other decisions necessary for a project to proceed. We also believe that Administration-led project delivery improvements, such as concurrent agency reviews, where practicable, online project dashboards that track progress and help ensure transparency and accountability, are other identified best practices that may warrant codification.

3. Chairwoman Sutley, in your testimony you cite statistics on how the vast majority of transportation projects are handled through categorical exclusions, the least intensive form of NEPA review.

MAP-21 included a number of provisions to help expedite these reviews, such as through programmatic agreements. Do you believe that these reforms can help accelerate small projects and focus resources on those projects that will have a significant impact on the environment? Are there additional reforms that could be made to expedite smaller projects?

- A. In 2010 CEQ released *Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act* which gave agencies considerable information on how to develop and utilize categorical exclusions to satisfy NEPA review and to expedite smaller projects that may occur in high volumes. The draft Programmatic NEPA Guidance (mentioned above) will complement the 2010 categorical exclusion guidance and give agencies further direction on conducting efficient environmental review for repetitive actions. As you mention, there are many cases in which agreements have facilitated project review, for example, by helping to establish cooperative schedules among parties or a path forward on Section 106 review of historic properties. With the two CEQ guidance documents, and the ability to enact project-level agreements and agreements for similar repetitive actions, agencies have a versatile toolbox with which to make project development and review more efficient and effective.

**Questions from: Senator Sheldon Whitehouse**

1. Lead agencies may establish a schedule for completion of the environmental review process "after consultation with and concurrence of each participating agency...." 23 U.S.C. 139(g)(B). With respect to the dispute resolution process established in MAP-21, a lead agency is required to consult with relevant agencies, but their concurrence appears not to be required by statute in all cases.

Deadlines. The deadlines referred to in subparagraph (A) shall be those established under subsection (g), or any other deadlines established by the lead agency, in consultation with the project sponsor and other relevant agencies. 23 U.S.C. § 139(h)(4)(B), as amended by MAP-21 Section 1306 (emphasis added).

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Is it your interpretation of this provision that a lead agency need not seek the concurrence of the project sponsor and other relevant agencies to set deadlines subject to dispute resolution? If so, under what circumstances in which a lead agency may set a deadline without agreement of the project sponsor and relevant agencies? What are examples of the types of deadlines that may be set in those circumstances?

- A. The deadlines in subparagraph 23 U.S.C. § 139(h)(4)(A) address decisions following the close of the public comment period on a draft environmental impact statement which would include the coordination plan schedules requiring consultation and concurrence for completing environmental reviews (23 U.S.C. § 139(g)(B)(i)). There are decisions beyond environmental review decisions that could potentially be the subject of deadlines developed by the lead agency in consultation with the project sponsor and the relevant agencies. As noted, the language says “consult” and not “concurrence.” DOT has not, to date, issued guidance on which decisions require concurrence. As a general matter, we believe the concurrence of other relevant agencies in establishing deadlines is an important principle in this matter as they have other statutory obligations, such as the Endangered Species Act or the Clean Water Act, which may require additional time beyond a deadline proposed by the lead agency or analyses that go beyond the scope typically used by the lead agency. A process that could conceivably be driven by a lead agency by only “consulting” with other “relevant agencies” in setting and enforcing deadlines could have significant and unforeseen consequences for affected communities and the environment. As noted in a prior response, there is merit to receiving concurrence from resource and permitting agencies which have to base their decisions on a legislatively directed single DOT-led NEPA analysis to satisfy the legal requirements of those resource agencies.

Senator BOXER. Thank you. We will now hear from Joseph Come, Assistant Inspector General for Highway and Transit Audits, U.S. Department of Transportation. Welcome, sir, and thank you for your work.

**STATEMENT OF JOSEPH COME, ASSISTANT INSPECTOR GENERAL FOR HIGHWAY AND TRANSIT AUDITS, U.S. DEPARTMENT OF TRANSPORTATION**

Mr. COME. Thank you, Chair Boxer, Ranking Member Vitter and members of the Committee. Thank you for the opportunity to testify on DOT's actions to address project delivery acceleration provisions in MAP-21.

My statement today is based on our May 2013 letter to the Committee, along with some updated information that DOT provided last week. We want to let you know our initial assessment of DOT's plans for implementing these provisions. This initial assessment will serve as a baseline and scorecard for future, more comprehensive work which we are mandated to conduct under MAP-21. Our mandate extends through fiscal year 2016.

As we reported in May, DOT's plan addressed all required elements of the law and includes 42 actions, such as issuing regulations and guidance, as well as reports to Congress. DOT had completed 5 of 42 planned actions, including issuing a final rule on categorical exclusions for expediting projects after emergencies, we have heard several mentions of that one here, and interim guidance on accelerating environmental reviews. According to DOT, as of last week, it had completed two other actions.

For most other actions, DOT said it had made progress even though more was needed. For example, it met the statutory deadline for issuing a combined proposed rule on the use of categorical exclusions for projects within an existing right of way and for projects with limited Federal assistance, but the final rule has yet to be issued. Our scorecard is a tough one, you have to issue the final rule before it is considered finished.

We observed in our May letter that for some planned actions, DOT hadn't yet assigned estimated completion dates, making it difficult to gauge progress and ensure accountability. DOT officials noted that they were focusing first on statutory rulemakings and required reports. And we agree, this is a reasonable priority.

However, establishing milestone dates whenever feasible across all planned actions would serve as an important management tool for department leadership to promote accountability and provide useful status information to key stakeholders. For example, if targets are set for issuing guidance on a certain topic and made known, officials in the States you represent can more readily make plans for incorporating new provisions. DOT did tell us last week that since our report in May they have set milestones for two more final rules and two more of the pending guidance actions, showing progress in this area.

Still, our May review showed that DOT was already experiencing delays with implementing some required rules. For example, it missed the January 2013 congressional deadline to issue a notice of proposed rulemaking on additional categorical exclusions sug-

gested by stakeholders. And publication of the rule continues to be delayed. Last week, DOT reported some further delays.

We recognize that the rulemaking process can be time-consuming, sometimes taking several years, especially when inter-agency coordination and a range of stakeholders are involved, as they are often here. Given these challenges, it is important for the Department to provide sustained management attention on implementing these MAP-21 provisions. The plan they have established addresses the required elements, but the sooner the provisions are put in place, the sooner States and others managing Federal projects can realize the intended benefits.

We will continue to assess DOT's actions and report to the Committee on its progress as we carry our statutory mandate to assess the Subtitle C provisions for accelerating project delivery.

This concludes my statement, and I would be happy to answer any questions that you have.

[The prepared statement of Mr. Come follows:]

Before the Committee on Environment and Public Works  
United States Senate

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For Release on Delivery  
Expected at  
10:00 a.m. EDT  
Wednesday  
September 18, 2013  
CC-2013-031

## **Status of the Department of Transportation's Actions To Address Subtitle C of the Moving Ahead for Progress in the 21st Century Act**

**Statement of  
Joseph W. Comé  
Assistant Inspector General for Highway  
and Transit Audits  
U.S. Department of Transportation**



Chairman Boxer, Ranking Member Vitter, and Members of the Committee:

Thank you for the opportunity to testify today on the Department of Transportation's (DOT) actions to carry out provisions in Subtitle C of the Moving Ahead for Progress in the 21st Century Act (MAP-21),<sup>1</sup> which calls for accelerating project delivery through increased innovation and efficient project planning, design, construction, and financing. MAP-21 requires our office to assess and report periodically to Congress on the steps the Department has taken to administer Subtitle C. Over the next 3 years, we plan to conduct a series of audits of the Department's project delivery reforms.<sup>2</sup> In a May 2013 letter to your Committee and the House Committee on Transportation and Infrastructure, we reported on the results of our first review.<sup>3</sup> The focus of our initial review was to proactively provide status information to congressional and other stakeholders on (1) the Department's plans to carry out provisions of MAP-21, Subtitle C; (2) the status of planned actions; and (3) key challenges that could delay the Department's implementation of those plans. We also sought to create a baseline of planned actions to guide our future audit work, which will provide a more comprehensive assessment of DOT's actions.<sup>4</sup>

My statement today focuses on what we found in our initial review—recognizing that the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Office of the Secretary of Transportation (OST) continue to actively work on Subtitle C in real time and that our initial review reflected a snapshot in time.

## **IN SUMMARY**

DOT developed a plan with 42 actions to implement all required sections of Subtitle C. At the time of our May 2013 letter, the Department had completed five actions, most of which address environmental issues that occur during the planning and design phase of highway and transit projects. However, the plan did not assign estimated completion dates for all actions unless the statute specified such milestones. Establishing target dates whenever feasible would provide a management tool to promote accountability for timely completion of these efforts, and allow Congress, States, and other stakeholders to gauge the Department's progress. Based on a status update that the Department provided us on September 11, 2013, the Department reports that two additional planned actions have been completed, and it established additional completion dates for four actions. Despite the Department's steady progress in meeting certain MAP-21 rulemaking milestones, we identified a number of delays that the Department had already encountered with issuing some Subtitle C rules. In its September 2013 update, the Department reported that it has

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<sup>1</sup> Pub. L. No. 112-141 (2012), Division A, Title I, Subtitle C.

<sup>2</sup> OIG Audit Announcement, "Audit Initiated of DOT's Implementation of MAP-21 Acceleration of Project Delivery Provisions," Nov. 28, 2012.

<sup>3</sup> "Letter to Congress on the Status of MAP-21, Subtitle C: Acceleration of Project Delivery," May 22, 2013.

<sup>4</sup> Our May letter focused on actions completed as of March 27, 2013. We did not perform audit procedures to confirm the actual status of the planned actions or assess the effectiveness of actions taken, as this was beyond the scope of our initial review.

experienced delays in completing eight rulemakings. The attachment, from our May letter, shows the 42 actions planned to implement Subtitle C and the status of each one, as of March 27, 2013.

## **BACKGROUND**

MAP-21 is the first long-term surface transportation authorization since 2005. The legislation was signed into law in July 2012 and effective as of October 1, 2012. MAP-21 provided \$105 billion for fiscal years 2013 and 2014. According to FHWA, complex federally funded highway projects can take approximately 13 years to complete (from planning to construction). Subtitle C directs the Department to identify and promote reforms that will reduce the time and funding needed to plan, design, and construct surface transportation projects. Most but not all of Subtitle C's project delivery reforms relate to environmental issues during the planning and design phase of highway and transit projects.

DOT's plans for implementing the Subtitle C sections range from developing and issuing regulations, some of which are required by law, to issuing guidance, developing memorandums of agreement, preparing congressional reports, or other initiatives. See table 1 for a list of Subtitle C sections.

**Table 1. Sections in Subtitle C of MAP-21**

Section	Title
1301	Declaration of Policy and Project Delivery Initiative
1302	Advance Acquisition of Real Property Interests
1303	Letting of Contracts—Construction Manager/General Contractor
1304	Innovative Project Delivery Methods
1305	Efficient Environmental Reviews for Project Decisionmaking
1306	Accelerated Decisionmaking
1307	Assistance to Affected Federal and State Agencies
1308	Limitations on Claims
1309	Accelerating Completion of Complex Projects Within 4 Years
1310	Integration of Planning and Environmental Review
1311	Development of Programmatic Mitigation Plans
1312	State Assumption of Responsibility for Categorical Exclusions
1313	Surface Transportation Project Delivery Program
1314	Application of Categorical Exclusions for Multimodal Projects
1315	Categorical Exclusions in Emergencies
1316	Categorical Exclusions for Projects Within the Right-of-Way
1317	Categorical Exclusion for Projects of Limited Federal Assistance
1318	Programmatic Agreements and Additional Categorical Exclusions
1319	Accelerated Decisionmaking in Environmental Reviews

Section	Title
1320	Memoranda of Agency Agreements for Early Coordination
1321	Environmental Procedures Initiative
1323	Review of Federal Project and Program Delivery

Source: MAP-21

To develop and issue regulations, the Administrative Procedure Act (APA) generally requires agencies to publish a notice of proposed rulemaking (NPRM) in the Federal Register, allow a comment period, issue a final rule with a statement of its basis and purpose, and publish a final rule at least 30 days before it becomes effective. APA allows agencies to issue final rules without the use of an NPRM in certain cases, including when the agency determines for “good cause” that notice and comment procedures are “impracticable, unnecessary, or contrary to the public interest.” The Office of Management and Budget (OMB) reviews “significant” proposed and final rules,<sup>5</sup> from agencies other than independent regulatory agencies, before they are published in the Federal Register.<sup>6</sup> OMB ultimately determines whether a rule is significant—an action that can extend the time to complete a rulemaking.

## **THE DEPARTMENT COMPLETED SOME ACTIONS DEFINED IN ITS PLAN**

To comply with MAP-21, which went into effect on October 1, 2012, DOT completed a plan with 42 actions for implementing Subtitle C requirements. As of March 27, 2013 (when we completed work on our initial audit), the Department had completed five of those actions:

- published an NPRM and final rule for Section 1315(a) on the use of categorical exclusions (CE) to expedite projects after a disaster or other emergency,
- issued guidance on innovations to improve project delivery identified in Section 1304,
- completed an initial report on the National Environmental Policy Act (NEPA) and projects for Section 1306
- surveyed and reported on the use of CEs for Section 1318, and
- completed interim guidance on accelerated decision making for environmental reviews for Section 1319.

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<sup>5</sup> Significant rulemakings are those that have an annual economic effect of \$100 million or more; could adversely affect the environment, public health or safety, actions of another agency, or a government program or policy; or create a legal issue or other material impact.

<sup>6</sup> Executive Order 12866 (reaffirmed by Executive Order 13563).

According to the Department, 34 of the remaining 37 planned actions were under way at the time of our May letter.<sup>7</sup> The Department also reported making substantial progress on many of them, even if final actions are not yet complete. For example, the Department met the statutory deadline for issuing an NPRM for Sections 1316 and 1317 on the use of CEs for projects within the right-of-way and projects with limited Federal assistance. The final rule has yet to be published. Rulemaking for Section 1318 on the use of additional types of CEs was also in progress but significantly behind schedule. In this instance, Department officials explained that an NPRM for Section 1318 cannot be completed until an analysis is performed on the survey results, which was still being conducted. The NPRM has yet to be published.

Department officials told us that they had not begun work on the remaining three planned actions: establishing a best practices clearing house related to accelerated project delivery, developing guidance on integrating planning and environmental reviews, and reporting on the types of and justification for additional CEs. The Department stated that it has not begun these three actions because other actions either have a higher priority or need to be completed before it can start these actions.

On September 11, 2013, the Department provided us a status update on its planned actions, which we have not yet verified. According to the Department, it has completed two additional planned actions—guidance for Section 1301 on the Relocation Streamlining Demonstration Project and guidance for Section 1302 on advance acquisition of real property interests. The Department also noted that it has made additional progress on several planned actions, including issuing an NPRM for Section 1313 on the Surface Transportation Project Delivery Program, and submitting to OMB an advanced notice of proposed rulemaking related to Section 1315 on using CEs for emergencies.

#### **THE DEPARTMENT DID NOT ASSIGN COMPLETION DATES FOR SEVERAL ACTIONS IN ITS MAP-21 PLANS**

While the Department developed plans to implement all required sections within Subtitle C (Sections 1301-1323),<sup>8</sup> it did not assign estimated completion dates to a number of planned actions, including final rulemakings, new guidance, and other program initiatives. Without estimated completion dates, the Department is missing an opportunity to effectively track these efforts and gauge the Department's progress. In its September 2013 update, the Department stated that it has established four additional completion dates for planned actions. For example, the Department reported that it established some additional target dates related to guidance and rulemakings.

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<sup>7</sup> The Department provided information on the status of its 34 actions shown as "in progress." We did not verify the status of the planned actions or assess the effectiveness of actions taken, as this was beyond the scope of our initial review.

<sup>8</sup> Section 1322 requires actions from the Government Accountability Office (GAO), so we have not included this section in our summary of DOT's action plans.

OST, FHWA, and FTA are coordinating the Department's Subtitle C plans, which fall within the following five general categories:

- **Congressionally Required Rulemakings:** According to the Department, it plans to issue eight congressionally required rules to streamline the environmental review process used on Federal highway and transit projects. To meet the statutory deadlines, the Department prioritized rules that were congressionally required. For example, the Department issued a congressionally required NPRM and a final rule for Section 1315, which qualified emergency repair projects to be eligible for categorical exclusions. In its September 2013 update, the Department reported that it established additional completion dates for two final rules.
- **Department-Initiated Rulemakings:** The Department planned to develop three additional rules to implement certain sections of Subtitle C, including early acquisition of right-of-way, contract letting, and environmental planning. For example, the Department plans to issue a new rule to implement Section 1303, which will permit a newer type of contracting method called construction manager/general contractor.<sup>9</sup> The Department estimated NPRM completion dates for all three planned rules but did not set estimated dates for publishing the final rules.
- **Congressionally Mandated Reports:** The Department's plans call for five categories of reports to inform Congress or other interested parties of the status of environmental actions taken. Four of the five report types have congressionally mandated due dates. For example, Section 1306 directs the Department to issue a report to Congress at least every 120 days on the NEPA status of projects. The Department issued an initial report in March 2013. The next one will be due in October 2013. However, the Department did not have a planned completion date for the remaining report type, which will convey the results of a Departmental review to assess and develop consistent environmental permit and procurement procedures, as required by Section 1321.
- **Guidance:** The Department identified 16 planned actions to issue new or modify existing guidance to assist States and others managing Federal projects. As of March 2013, the Department had issued guidance for 2 of these 16 actions. However, the Department did not have estimated completion dates for the remaining 14 actions. In its September 2013 update, the Department reported that it established dates for two planned actions related to guidance.
- **Other Initiatives:** The Department included three other initiatives in its plan— one covering Section 1318 on programmatic agreements and additional CEs, and two to address Section 1301 on the declaration of policy and project delivery. While the

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<sup>9</sup> The construction manager/general contractor project delivery method allows an owner to engage a construction manager during the design process to provide input that helps the owner design a more constructible project.

Department completed the Section 1318 initiative, it had not formalized a schedule for the 1301 initiatives at the time of our May 2013 letter.

Department officials stated that their first priority was to publish statutorily required rules, focusing on those with congressionally mandated deadlines, and to prepare required reports with deadlines. The Department would then focus on self-initiated rulemakings for sections that add new provisions or alter existing regulations. After that, the Department would develop and publish guidance while working on other initiatives identified in its plans. Department officials noted that given the high priority placed on rulemakings, they did not set milestones for other planned actions. They also noted that legal requirements in the rulemaking process, the inability to predict the time needed to complete the various rulemaking stages, and OMB's designation of a rule as "significant"<sup>10</sup> influenced their decision to defer setting milestones for some final rules.

While we agree that the Department's decision to focus first on rulemakings and required reports was reasonable, establishing milestone dates whenever feasible would provide useful information to key stakeholders and a management tool to promote accountability for timely completion of these efforts. Further, the legal requirements of the rulemaking process do not preclude estimating completion dates. Establishing such dates for final rules and for guidance and reporting requirements is important to help the Department better manage the rulemaking and guidance process and allow its stakeholders to effectively plan to implement the new rulemakings and guidance. For example, if States can better gauge when FHWA plans to complete a certain action, they can more readily incorporate new legislative provisions in their project plans and specifications.

#### **DOT MAY NOT COMPLETE REQUIRED RULEMAKINGS BY THE STATUTORILY SET DATES**

The Department may not complete required rulemakings by the statutorily set dates, due in part to the nature of rulemaking. Completing parts of the rulemaking process and coordinating steps that involve other Federal agencies can take considerable time. Despite the Department's progress in meeting certain MAP-21 rulemaking milestones, our initial review showed that the Department was already experiencing delays with implementing some mandated rules. In its September 2013 update, the Department reported that it has experienced additional delays in completing eight rulemakings. Highway and transit industry associations and State officials also noted that a lack of early, interactive communication with them may increase the number of formal comments and the time to complete rulemakings.

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<sup>10</sup> OMB may define a rule as "significant," which, according to the Department, would add 3 to 6 months of review time.

### **Completing Rulemakings Can Take Considerable Time, and Some Subtitle C Rules Have Been Delayed**

A 2009 GAO case study reviewed 16 Federal rulemakings at various agencies and found that they took approximately 4 years on average to complete.<sup>11</sup> DOT's four rules averaged just over 3 years from initiation to final publication. We also reviewed three other rules issued by FHWA and FTA under previous surface transportation authorization, which had similar results. These three rules took an average of just over 5 years from initiation to final publication. Given the time periods involved in the Department's prior rulemakings, it may be optimistic to assume that the Department can complete the remaining required Subtitle C rulemaking milestones established within the 2 year legislative life of MAP-21.

We also identified a number of delays that the Department was already encountering with issuing some Subtitle C rules. For example, the Department missed the congressionally mandated requirement to issue an NPRM by January 2013 for Section 1318 on additional CEs suggested by stakeholders—and publication continues to be delayed. Department officials explained that there were many challenges to issuing this NPRM, including the requirement to complete the survey and publish a report after soliciting ideas for new CEs from stakeholders. These actions must be completed before it can issue a rule to further expand the types of CEs that can be used on Federal projects. In addition, this section may be designated as “significant” by OMB, which would require additional reviews and further impact the timeframe for both the NPRM and the final rule.

In its September 2013 status update, the Department stated that eight of its rulemakings have been delayed. For example, the Department has submitted to OMB an advanced notice of proposed rulemaking related to Section 1315 on using CEs for emergencies, but the publication date for the NPRM is planned for later this month—a delay of about 3 months.

### **Transportation Industry Stakeholders Believe That Interactive Dialogue With the Department Could Help Expedite Rulemakings**

According to DOT officials, the Department made considerable outreach efforts related to MAP-21 implementation, including webinars, question and answer sessions, and other presentations conducted by FHWA and FTA. However, highway and transit industry associations<sup>12</sup> and State officials told us that outreach efforts tended to be Web-based, public forums that did not allow for sufficient informal, peer-to-peer dialogue prior to the NPRM. They indicated that—similar to prior transportation authorizations—early, interactive dialogue with the Department might reduce the time to respond to formal

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<sup>11</sup> GAO Report, *Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews* (GAO-09-205), Apr. 20, 2009. The case study included DOT and other agencies such as the Environmental Protection Agency, Food and Drug Administration, and Securities and Exchange Commission.

<sup>12</sup> The highway and transit organizations we spoke with are the American Association of State Highway and Transportation Officials (AASHTO) and the American Public Transportation Association (APTA).

comments. State officials also noted a lack of notification from the Department concerning upcoming NPRMs as well as guidance and other relevant documents on FHWA's MAP-21 Web site.

### **CONCLUSION**

The Department developed a plan that addresses all MAP-21 Subtitle C provisions. However, as our initial assessment reveals, timely completion of planned actions could advance States' and other stakeholders' management of Federal projects and better achieve the intended benefits of MAP-21's innovation and streamlining provisions. Efforts by the Department to ensure the timely completion of rulemakings, guidance, program initiatives, and reports to Congress will be key to successful implementation of MAP-21. Accordingly, we will continue to assess the Department's actions to implement Subtitle C and carry out our statutory mandate to audit the Department's efforts over time.

That concludes my testimony. I will be happy to answer any questions you may have.

**ATTACHMENT. THE DEPARTMENT'S PLANNED ACTIONS TO IMPLEMENT MAP-21 SUBTITLE C,  
AS OF MARCH 27, 2013**

This table from our May 2013 letter provides the status of the Department's planned actions as of March 27, 2013. We did not verify the Department's progress since our May letter, as it was not within the scope of our initial review.

Section Title	Lead	Other Modes Involved	Type of Deliverable/ Action*	Deliverable According to the Department	Anticipated Completion Date (Bold = Statutory Deadline)	Status According to the Department
1301: Declaration of Policy and Project Delivery Initiative	1-OST	FHWA, FTA	Initiative: Best Practices	Identify and advance the use of best practices.	None at this time	Not started. FHWA's Every Day Counts <sup>2</sup> creates inventory of best practices. OST may establish a "dashboard" site for posting best practices. FTA has not taken any action to implement this section.
	2-FHWA		Guidance	Guidance on Relocation Streamlining Demonstration Project to address 1301(b)(4).	None at this time	In progress. Initiating drafting of demonstration project in FHWA.
	3-FHWA		Initiative: MOAs	Solicitation / Memorandums of Agreement (MOAs) for Relocation Streamlining Demonstration Project to address 1301(b)(4).	None at this time	In progress.
1302: Advance Acquisition of Real Property Interests	4-FHWA		Guidance	Guidance on advance acquisition of real property interests.	None at this time	In progress. Draft under coordination in FHWA.
	5-FHWA		Rulemaking	Regulation on advance acquisition of ROW.	NPRM 10/13 FR None at this time	In progress. Early draft in coordination in FHWA.

**Attachment. The Department's Planned Actions To Implement Map-21 Subtitle C, as of March 27, 2013**

<b>Section Title</b>	<b>Lead</b>	<b>Other Modes Involved</b>	<b>Type of Deliverable/ Action*</b>	<b>Deliverable According to the Department</b>	<b>Date (Bold = Statutory Deadline)</b>	<b>Status According to the Department</b>
1303: Letting of Contracts – Construction Manager / General Contractor	6-FHWA		Rulemaking	Regulation on Construction Manager / General Contractor contracting.	NPRM 8/13 FR None at this time	In progress. Draft NPRM and rulemaking schedule under development.
1304: Innovative Project Delivery Methods	7-FHWA		Guidance	Guidance on increased Federal share for innovation.	10/1/2012	Complete. Guidance issued on 10/1/12 as a Q&A document.
1305: Efficient Environmental Reviews for Project Decisionmaking	8-FHWA	FTA, OST	<b>Required Rulemaking</b>	Rulemaking to allow for the use of programmatic approaches to conduct environmental reviews.	NPRM 6/14 FR None at this time	In progress. A future decision is pending to determine whether Section 1305 rulemaking will be initiated as separate rule, or incorporated into the "clear-up" rulemaking in connection with other MAP-21 provisions.
9-FHWA	FTA		Guidance	Guidance on designation of lead agency for multimodal projects to address 1305(a).	None at this time	In progress. Guidance being developed to address multiple changes to 23 U.S.C. 138, including this section. Guidance drafted and in review by program offices.
10-FHWA	FTA		Guidance	Guidance on efficient environmental reviews / Federal lead agency to address 1305(b).	None at this time	In progress. Guidance on lead agency designation is expected as part of DOT NEPA Order that is in development. Guidance drafted and in review by program offices.
11-FHWA	FTA		Guidance	Guidance on efficient environmental reviews to address 1305(c),(d), and (e).	None at this time	In progress. Guidance drafted and in review by program offices.

<b>Section Title</b>	<b>Lead</b>	<b>Other Modes Involved</b>	<b>Type of Deliverable/ Action*</b>	<b>Deliverable According to the Department</b>	<b>Anticipated Completion Date (Bold = Statutory Deadline)</b>	<b>Status According to the Department</b>
1306: Accelerated Decisionmaking	12-FHWA, OST		Congressional Report	Report to Congress at least every 120 days on NEPA status and projects of (1) projects requiring a financial plan and (2) sampling of at least 5% of projects requiring an EIS or EA in each State.	Every 120 days. Initial report due: 2/1/13. Next due: 8/1/13.	Complete. Initial report issued on March 14, 2013.
13-FHWA, OST	FTA		Guidance	Guidance on dispute resolution referrals and time limits.	None at this time	In progress. Guidance drafted and in review by program offices. Coordination with affected Federal agencies is underway. Part of Section 1305 guidance effort.
14-FHWA, OST	FTA		Potential Rulemaking	Rulemaking on dispute resolution referrals and time limits.	NPRM 6/14 FR None at this time	In progress. This is a potential rulemaking and may be addressed as part of the 'clean-up' rulemaking as referenced in Section 1305 rulemaking effort.
1307: Assistance to Affected Federal and State Agencies	15-FHWA	FTA	Guidance	Guidance on MOA with Federal and State agency that establishes the projects and priorities to be addressed by the use of the funds.	None at this time	In progress. Guidance issued 9/25/12 as Q&A document. Determination on whether further guidance is needed not yet made. Part of Section 1305 guidance effort.

<b>Section Title</b>	<b>Lead</b>	<b>Other Modes Involved</b>	<b>Type of Deliverable/ Action*</b>	<b>Deliverable According to the Department</b>	<b>Anticipated Completion Date (Bold = Statutory Deadline)</b>	<b>Status According to the Department</b>
1308: Limitations on Claims	16-FHWA	FTA	Rulemaking	Rulemaking on revising the deadline for filing a claim for judicial review to 150 days from 180 days.	NPRM 6/14 FR None at this time	In progress. This is part of a 23 CFR 771 "clean-up" rulemaking as referenced in Section 1305 rulemaking effort.
	17-FHWA	FTA	Guidance	Guidance on revising the deadline for filing a claim for judicial review to 150 days rather than 180 days.	None at this time	In progress. This section will be included in the Section 1305 guidance effort.
1309: Accelerating Completion of Complex Projects Within 4 Years	18-FHWA	FTA	Potential Rulemaking	Rulemaking on enhanced technical assistance for complex projects within 4 years.	NPRM 6/14 FR None at this time	In progress. This is a potential rulemaking at this time, and may be addressed as part of the "clean-up" rulemaking as referenced in the Section 1305 rulemaking effort.
	19-FHWA	FTA	Guidance	Guidance on enhanced technical assistance for complex projects within 4 years.	None at this time	In progress. Part of Section 1305 guidance effort.
1310: Integration of Planning and Environmental Review	20-FHWA	FTA	Potential Guidance	Guidance on integration of planning and environmental review.	None at this time	Not started. Potential for further guidance.
	21-FHWA	FTA	Rulemaking	Rulemaking on integration of planning and environmental review.	NPRM 11/20/13 FR None at this time	In progress. Coordinating timing with performance measure rulemaking. This schedule may change as a result of further discussion within the Department.

<b>Section Title</b>	<b>Lead</b>	<b>Other Modes Involved</b>	<b>Type of Deliverable/ Action*</b>	<b>Deliverable According to the Department</b>	<b>Anticipated Completion Date (Bold = Statutory Deadline)</b>	<b>Status According to the Department</b>
1311: Development of Programmatic Mitigation Plans	22-FHWA	FTA	Rulemaking	Rulemaking on integration of planning and environmental review.	NPRM 11/20/13 FR None at this time	In progress. This section will be incorporated into the rulemaking discussed in Section 1310. This schedule may change as a result of further discussion within the Department.
1312: State Assumption of Responsibility for Categorical Exclusions (CEs)	23-FHWA	FTA	Guidance	Update guidance on state assumption of responsibility for categorical exclusions.	None at this time	In progress. Under development by program offices.
1313: Surface Transportation Project Delivery Program	24-FHWA	FTA	<b>Required Rulemaking</b>	Rulemaking to update regulations.	NPRM 5/24/13 FR 6/28/13	In progress; behind schedule. The Department is determining whether additional modes (e.g., FAA, MARAD, NHTSA) will participate in this rulemaking. Final rule deadline will not be met; they anticipate a final rule on 9/28/13.
1314: Application of CEs for Multimodal Projects	26-OST	FTA, FHWA	Guidance	Update guidance on state assumption of responsibility for categorical exclusions.	None at this time	In progress. Q&A document(s) have been drafted and shared with modes for comment.

<b>Section Title</b>	<b>Lead</b>	<b>Other Modes Involved</b>	<b>Type of Deliverable/ Action*</b>	<b>Deliverable According to the Department</b>	<b>Date (Bold = Statutory Deadline)</b>	<b>Anticipated Completion Date (Bold = Statutory Deadline)</b>	<b>Status According to the Department</b>
1315: CEs in Emergencies	27- FHWA OST	FHA, OST	<b>Required Rulemaking</b>	Rulemaking to qualify 'emergency repair' projects as CEs.	NPRM 10/30/12 FR 2/19/13	NPRM 10/30/12 FR 2/19/13	Complete. NPRM was published on 10/1/12. Final rule was published in Federal Register, effective as of 2/19/13.
28- FHWA	OST		<b>Required Rulemaking</b>	Regulation on evaluation of alternatives to facilities repeatedly requiring repair or reconstruction.	NPRM 11/20/13 FR None at this time	In progress. Agencies solicited comments on regulatory approach in NPRM for Section 1315(a). FHWA and FTA will be issuing rules separately. FHWA plans to implement the requirement in its Asset Management rulemaking, with an NPRM scheduled to publish 11/20/13.	
29- FTA	OST		<b>Required Rulemaking</b>	Regulation on evaluation of alternatives to facilities repeatedly requiring repair or reconstruction.	IFR 4/1/13	In progress. FTA is implementing the requirement through rulemakings for new Emergency Relief program (49 USC 5324). They will issue an interim Final Rule (IFR) in place of a final rule.	
30- FTA	OST		<b>Required Rulemaking</b>	Regulation on evaluation of alternatives to facilities repeatedly requiring repair or reconstruction.	ANPRM 6/20/13 FR 10/1/14	In progress. Will be incorporated into the new Transit Asset Management program (49 USC 5326). Program office drafting ANPRM for Transit Asset Management Program.	

<b>Section Title</b>	<b>Lead</b>	<b>Other Modes Involved</b>	<b>Type of Deliverable/ Action*</b>	<b>Deliverable According to the Department</b>	<b>Anticipated Completion Date (Bold = Statutory Deadline)</b>	<b>Status According to the Department</b>
1316: CEs for Projects Within the Right-of-Way	31- FHWA FTA		<b>Required Rulemaking</b>	Promulgate regulations defining as CE projects in operational right-of-way.	<b>NPRM</b> 2/28/13 Implement 3/30/13	In progress; behind schedule. Combined rulemaking with Section 1317. NPRM published on 2/28/13. No schedule for final rulemaking.
1317: CE for Projects of Limited Federal Assistance	32- FHWA FTA		<b>Required Rulemaking</b>	Promulgate regulations to designate projects of limited Federal assistance as CEs within 180 days of enactment.	<b>NPRM</b> 2/28/13 Implement 3/30/13	In progress; behind schedule. Combined rulemaking with 1316. NPRM published on 2/28/13. No schedule for final rulemaking.
1318: Programmatic Agreements and Additional Categorical Exclusions	33- FHWA OST		Initiative: Survey & Solicitation	Survey uses of CEs by DOT since 2005, publish review of survey, and solicit requests for new CEs.	11/30/12	Complete. Survey conducted and review report posted on 12/7/2012. Federal Register notice of availability of report published 12/13/2012.
	34- FHWA OST		<b>Required Rulemaking</b>	Rulemaking to add new CEs suggested by others and as listed in statute.	<b>NPRM</b> 1/29/13 FR 10/1/14	In progress; behind schedule. The Department now expects to publish the NPRM in August 2013. Program offices drafting rule.

<b>Section Title</b>	<b>Lead</b>	<b>Other Modes Involved</b>	<b>Type of Deliverable/ Action*</b>	<b>Deliverable to the Department</b>	<b>Date (Bold = Statutory Deadline)</b>	<b>Anticipated Completion Date (Bold = Statutory Deadline)</b>	<b>Status According to the Department</b>
1319: Accelerated Decisionmaking in Environmental Reviews	35- FHWA FTA	Guidance	Interim guidance on accelerated decisionmaking on environmental reviews.	Interim guidance on accelerated decisionmaking on environmental reviews.	1/14/13	Complete	Internal interim guidance jointly issued by FHWA & FTA On 1/14/13.
	36- FHWA FTA	Potential Rulemaking	Regulation on accelerated decisionmaking on environmental reviews.	Regulation on accelerated decisionmaking on environmental reviews.	NPRM 6/14 FR None at this time	In progress.	This may be addressed as part of the "clean-up" rulemaking as referenced in Section 1305 rulemaking effort.
1320: Memoranda of Agency Agreements for Early Coordination	37- FHWA FTA	Guidance	Guidance on memoranda of agency agreements for early coordination.	Guidance on memoranda of agency agreements for early coordination.	None at this time	In progress.	No additional details provided by the Department.
	38- FHWA FTA	Potential Rulemaking	Rulemaking on memoranda of agency agreements for early coordination.	Rulemaking on memoranda of agency agreements for early coordination.	NPRM 11/20/13 FR None at this time	In progress.	Potential to be combined with rule for MAP-21 Sections 1310 and 1311. This schedule may change as a result of further discussion within the Department.
1321: Environmental Procedures Initiative	39- OST FHWA, FTA	Report	For formula grant funds distributed, the Secretary shall establish an initiative to review and develop consistent procedures for environmental permitting and report results.	For formula grant funds distributed, the Secretary shall establish an initiative to review and develop consistent procedures for environmental permitting and report results.	None at this time	In progress.	No additional details provided by the Department.

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<b>Section Title</b>	<b>Lead</b>	<b>Other Modes Involved</b>	<b>Type of Deliverable/ Action*</b>	<b>Deliverable According to the Department</b>	<b>Date (Bold = Statutory Deadline)</b>	<b>Status According to the Department</b>
1323: Review of Federal Project and Program Delivery	40- FHWA		Congressional Report	Report to Congress on results of review of Federal project and program delivery, pre-2005 projects.	<b>10/1/13</b>	In progress. No additional details provided by the Department.
	41- FHWA		Congressional Report	Report to Congress on results of review of Federal project and program delivery, post-2005 projects.	<b>10/1/17</b>	In progress. No additional details provided by the Department.
	42- FHWA FTA		Congressional Report	Report to Congress on types and justifications for additional categorical exclusions under sections 1316-1317.	<b>10/1/14</b>	Not started. Awaiting rulemaking for Sections 1316 and 1317.

Source: OIG compilation of information provided and confirmed by U.S. Department of Transportation agencies including OST, FHWA, and FTA.

Key: NPRM = Notice of Proposed Rulemaking. ANPRM = Advanced Notice of Proposed Rulemaking. FR = Final Rule. IFR= Interim Final Rule.

Note: Statutory deadlines are in bold; all other deadlines are the Department's estimated completion dates.

Note: There are 42 actions included in the Department's current plans; however, some of the sections with anticipated rulemakings may eventually be consolidated. For example, the Department plans to issue one rule to cover Sections 1316 and 1317.



**U.S. Department of  
Transportation**

Office of the Secretary  
of Transportation

Office of Inspector General  
Washington, D.C. 20590

February 12, 2014

The Honorable Barbara Boxer  
Chairman, Committee on Environment and Public Works  
United States Senate  
112 Hart Senate Office Building  
Washington, DC 20510

The Honorable David Vitter  
Ranking Member, Committee on Environment and Public Works  
United States Senate  
516 Hart Senate Office Building  
Washington, DC 20510

Dear Chairman Boxer and Ranking Member Vitter:

In response to your request, we are writing to answer your questions regarding our testimony<sup>1</sup> and initial assessment<sup>2</sup> of the Department's plans to carry out the accelerated project delivery provisions (Subtitle C) within the Moving Ahead for Progress in the 21st Century Act (MAP-21).<sup>3</sup> We have addressed each of your questions for the record.

In addition, the Department of Transportation (DOT) has updated its planned actions to implement Subtitle C as of January 28, 2014, and we have provided this information as an attachment to this letter. Please note that we have not independently validated the Department's progress provided in the attachment.

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<sup>1</sup> Status of DOT's Actions To Address Subtitle C of the Moving Ahead for Progress in the 21st Century Act (OIG Testimony CC-2013-031), Sept 18, 2013. OIG testimonies, reports, and correspondence are available on our Web site at: [www.oig.dot.gov](http://www.oig.dot.gov).

<sup>2</sup> "Letter to Congress on the Status of MAP-21, Subtitle C: Acceleration of Project Delivery" (OIG Letter CC-2013-007), May 22, 2013.

<sup>3</sup> Pub. L. No. 112-141 (2012), Division A, Title I, Subtitle C.

CC-2014-011

**Questions from Senator Barbara Boxer:**

- 1. Mr. Come, MAP-21 directs the IG's office to assess DOT's efforts to carry out the project delivery reforms included in Subtitle C and prepare an initial report within 2 years, culminating in a final report within 4 years of enactment.**

Your office issued the letter in May of this year on the results of your initial review and you have stated that you plan to conduct a series of additional audits over the next 3 years. Could you please elaborate on what additional work you plan to do and the timing of that work?

We have already started additional work related to Subtitle C and remain committed to conducting other audits that are timed to coincide with the Department's full implementation of key provisions. Specifically, we are addressing MAP-21 issues as part of an ongoing review of the Federal Highway Administration's (FHWA) major project oversight. We revised our audit objectives<sup>4</sup> to address whether additional project delivery tools are available or being used to manage select major projects' cost, schedule, and funding—including whether States have started to use any of MAP-21's accelerated project delivery provisions. Beyond this major projects audit, we are currently developing our audit plans for the remainder of 2014, which will include an additional audit of the Department's implementation of Subtitle C. We will continue to seek feedback from your staff on the scope and timing of our future audits.

- 2. Mr. Come, in May of this year your office did an assessment of the progress DOT has made up to that point. Now that additional time has passed, and based on the updated information provided to you by DOT, could you provide your overall assessment of the progress they have made during that period and any additional steps that could be taken to further improve their progress?**

As shown in the attachment provided by the Department, DOT has completed 11 actions as of January 28, 2014—6 more than it had completed at the time of our initial assessment in May 2013. Moreover, the Department states that 27 of the remaining 28 planned actions are in progress,<sup>5</sup> with several planned actions under review at either the Office of Management and Budget (OMB) or other external agencies. However, three of the congressionally required rulemakings are currently delayed, suggesting this is an area that warrants sustained management attention:

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<sup>4</sup> "Revised Audit Notification—Federal Highway Administration's Major Project Oversight" (OIG Project Number 13M3004M000), Nov. 22, 2013.

<sup>5</sup> As of March 27, 2013, DOT had 42 actions to implement Subtitle C. That number has been revised to 39 actions, as of January 28, 2014, because the Department consolidated or cancelled 3 of its planned actions.

- Section 1305, the Efficient Environmental Reviews for Project Decision Making Notice of Proposed Rulemaking (NPRM), was originally estimated to be issued in June 2014. The Department is now estimating a completion date of July 2014.
- The statutory deadline for Section 1313, the Surface Transportation Project Delivery Program Final Rule (FR), was June 28, 2013. The Department is now estimating a completion date of June 2014.
- Section 1315(b), the Asset Management NPRM, was originally estimated to be issued in November 20, 2013. The Department is now estimating that it will be issued in May 2014.

**3. Mr. Come during its work the IG's office found that many stakeholders felt that the outreach efforts of the DOT early in the rulemaking process for some MAP-21 provisions were insufficient and did not allow for adequate peer-to-peer dialogue.**

**As there are numerous rulemakings that are still early in the process to implement a wide range of MAP-21 provisions not just project delivery, what steps could DOT take to more effectively engage stakeholders on the front end of the rulemaking process?**

While we have not assessed the effectiveness of techniques for engaging stakeholders during the rulemaking process, we solicited the opinions of the American Association of State Highway and Transportation Organizations (AASHTO), including State DOT representatives from six States, and the American Public Transportation Association (APTA) on this issue. In their view, the Department could communicate with interested parties early and engage in interactive in-person dialogue similar to that used in prior transportation authorizations. These groups felt that this dialogue may reduce the time to respond to formal comments. For example:

- APTA officials stated that they would like to have early engagement with the Federal Transit Administration (FTA) as it begins to develop rulemakings and guidance. APTA officials also said they would like to have FHWA reach out directly to transit groups if its proposed rules will affect APTA members.
- AASHTO representatives, including State DOTs, stated that they were given the opportunity to provide early input on prior surface transportation authorizations by participating in large group forums and working groups. However, DOT did not use forums or working groups when implementing planned Subtitle C rulemakings. AASHTO officials added that it would be helpful if major stakeholders could provide input prior to the NPRM's publication in the Federal Register.

**Questions from Senator David Vitter:**

- 1. You mentioned in your testimony that both the Department of Transportation and outside stakeholders, including Congress, would benefit from a process that establishes deadlines for competing the 42 actions DOT believes are needed to fully implement MAP-21. Are there any legitimate reasons for not setting deadlines?**

No, and in responding to a question at the hearing, the then-Deputy Secretary stated that the Department was developing dates for every part of the legislation, although he stated that this was a significant task given the many provisions in the law. We continue to maintain, as we noted at the hearing, that establishing milestone dates whenever feasible would provide useful information to key stakeholders and a management tool to promote accountability for timely completion of these efforts. Milestones also help the Department better manage the rulemaking and guidance process, and allow its stakeholders to effectively plan to implement new rulemakings and guidance. Since our report in May 2013, the Department has established milestones for two additional final rules and two additional pending actions related to guidance.

- 2. Are there specific areas that you are concerned DOT is falling behind in its efforts to implement the law?**

Subtitle C of MAP-21 required rules to implement certain sections of the law, and the Department is developing seven rulemakings to meet this intent. To date, the Department has completed two of these required rulemakings for (1) Section 1315(a) on Qualify Emergency Relief as a Categorical Exclusion and (2) Sections 1316 and 1317 on Categorical Exclusions for Right of Way and Limited Federal Assistance.

Further, two rulemakings are in progress: (1) Section 1315(b) on Emergency Relief (with the interim final rule estimated to be issued on March 29, 2013) and (2) Section 1318, the New Types of Categorical Exclusions NPRM (issued on September 19, 2013—about 8 months past the statutory deadline of January 29, 2013).

However, as we noted in our response to Senator Boxer's second question, the remaining three rulemakings for Sections 1305, 1313, and 1315(b) are currently delayed. Since Congress prioritized these rulemakings as critical for accelerated project delivery, it is important for the Department to provide sustained management attention and implement them as timely as possible, so that States and others managing Federal projects can realize the intended benefits.

If you have any questions or need further information, please contact me at (202) 366-5630 or Nathan Richmond, Director and Counsel for Congressional and External Affairs, at (202) 493-0422.

Sincerely,



Joseph W. Comé  
Assistant Inspector General for Highway and Transit Audits

Attachment

**ATTACHMENT. THE DEPARTMENT'S PLANNED ACTIONS TO IMPLEMENT MAP-21  
SUBTITLE C, AS OF JANUARY 28, 2014**

6

Section Title	Lead	Other Modes Involved	Type of Deliverable/Action*	Deliverable Accruing to the Department	Initial Completion Date (Bold = Statutory Deadline)	Updated Completion Date (Bold = Statutory Deadline)	Rulemaking Completion Date(s) Delayed	Status According to the Department
1301: Declaration of Policy and Project Delivery Initiative	1-OST	FHWA, FTA	Initiative: Best Practices	Identify and advance the use of best practices.	None at this time	None at this time		In progress. DOT has been coordinating with United States Army Corps of Engineers (USACE) and United States Coast Guard (USCG) to better align processes and develop broadly applicable best practices. Specific deliverables will include updating the CG Bridge Memorandum of Understanding (MOU), completed 1/14/14 and the Red Book on National Environmental Policy Act (NEPA) Mergers. More information on best practices will be made available on the Dashboard. FHWA's Every Day Counts 2 creates inventory of best practices. FHWA has called for ideas for Every Day Counts 3.
	2-FHWA	Guidance	Guidance on Relocation Streamlining Demonstration Project to address 1301(b)(4).	None at this time	3/15/13			Complete. Guidance disseminated on 3/15/13. Demonstration projects underway.
	3-FHWA	Initiative: MOAs	Solicitation / Memorandums of Agreement (MOAs) for Relocation Streamlining Demonstration Project to address 1301(b)(4).	None at this time	None at this time			In progress. Revised MOU draft under internal FHWA review. Ongoing pre-coordination and discussion with agencies.

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Section Title	Lead	Other Modes Involved	Type of Deliverable/ Action*	Deliverable According to the Department	Initial Completion Date (Bold = Statutory Deadline)	Updated Completion Date (Bold = Statutory Deadline)	Rulemaking Completion Date(s) Delayed	Status According to the Department
1302: Advance of Real Property Interests	4-FHWA		Guidance	Guidance on advance acquisition of real property interests.	None at this time	9/25/12		Complete. Frequently Asked Questions (FAQ) on Advance Acquisition posted on FHWA Web site on 9/25/12 and shared with partners.
	5-FHWA		Rulemaking	Regulation on advance acquisition of Right-of-Way (ROW).	NPRM 10/13 Final Rule (FR) None at this time	NPRM 3/14 FR None at this time	✓	In progress. Final draft under internal FHWA review. Submitted request to OMB for significance determination.
1303: Letting of Contracts	6-FHWA		Rulemaking	Regulation on Construction Manager / General Contractor contracting.	NPRM 8/13 FR None at this time	NPRM 6/20/14 FR None at this time	✓	In progress. Questions and answers (Q&A) posted 9/25/2012. Draft Nprm under development and planned for 6/20/14.
Construction Manager / General Contractor	7-FHWA		Guidance	Guidance on increased Federal share for innovation.	10/1/2012	10/1/2012		Complete. Guidance issued on 10/1/12 as a Q&A document.

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Section Title	Lead	Other Modes Involved	Type of Deliverable/Action*	Deliverable According to the Department	Initial Completion Date (Bold = Statutory Deadline)	Updated Completion Date (Bold = Statutory Deadline)	Rulemaking Completion Date(s) Delayed	Status According to the Department
1305: Efficient Environmental Reviews for Project Decisionmaking	8-FHWA	FTA, OST	<b>Required Rulemaking</b>	Rulemaking to allow for the use of programmatic approaches to conduct environmental reviews.	NPRM 6/14 FR None at this time	NPRM 7/14 FR None at this time	✓	In progress. Congressionally mandated outreach is underway, which will inform the rulemaking. DOT anticipates including this as part of a rulemaking in connection with other MAP-21 corrections—specifically, the 23 Code of Federal Regulations (CFR) 77, "clean-up" rulemaking.
9-FHWA	FTA	Guidance	Guidance on designation of lead agency for multimodal projects to address 1305(e).	None at this time	None at this time	None at this time		In progress. Guidance being developed to address multiple changes to 23 United States Code (U.S.C.) 139, including this section. Guidance drafted and in review by program offices.
10-FHWA	FTA	Guidance	Guidance on efficient environmental reviews of Federal lead agency to address 1305(g).	None at this time	None at this time	None at this time		In progress. Guidance on 1305(b) is drafted and in review by program offices. Guidance on lead agency designation is also expected as part of DOT NEPA Order that is anticipated to be released June 2014.
11-FHWA	FTA	Guidance	Guidance on efficient environmental reviews to address 1305(g), (d), and (e).	None at this time	None at this time	None at this time		In progress. Guidance drafted and in review by program offices.

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1306: Accelerated Decisionmaking	12- FHWA, OST	Congressional Report	Report to Congress at least every 120 days on NEPA status and projects of (1) projects requiring a financial plan and (2) sampling of at least 5% of projects requiring an environmental impact statement or environmental assessment in each State.	Every 120 days. Initial report due: 2/1/13. Next due: 8/1/13.	Every 120 days. Initial report due: 2/1/13. Next due: 2/1/14.			Complete. Four reports issued (most recent on 1/8/14).
13- FHWA, OST	FTA	Guidance	Guidance on dispute resolution referrals and time limits.	None at this time	2/14			In progress. Guidance was considered significant and is in final stages of review by Federal Agencies, led by OMB.
14- FHWA, OST	FTA	Potential Rulemaking	Rulemaking on dispute resolution referrals and time limits.	NPRM 6/14	N/A	FFR None at this time		Canceled. No longer under consideration. This was a potential rulemaking and is no longer anticipated.
1307: Assistance To Affected Federal And State Agencies	15- FHWA	FTA	Guidance	Guidance on MOA with Federal and State agency that establishes the projects and priorities to be addressed by the use of these funds.	None at this time	None at this time		In progress. Guidance issued 02/5/12 as Q&A document. Part of Section 1305 guidance effort, which is being developed to address multiple changes to 23 U.S.C. 139, including this section. Additional Q&A guidance has been developed and is undergoing internal FHWA review.

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Section Title	Lead	Other Modes Involved	Type of Deliverable/Action*	Deliverable According to the Department	Initial Completion Date (Bold = Statutory Deadline)	Updated Completion Date (Bold = Statutory Deadline)	Rulemaking Completion Dates Delayed	Status According to the Department
1308: Limitations on Claims	16- FHWA	FTA	Rulemaking	Rulemaking on revising the deadline for filing a claim for judicial review to 150 days from 180 days.	NPRM 6/14 FR None at this time	NPRM 7/14 FR None at this time	✓	In progress. This is part of a 23 CFR 771 "clean-up" rulemaking, as referenced in Section 1305 rulemaking effort.
	17- FHWA	FTA	Guidance	Guidance on revising the deadline for filing a claim for judicial review to 150 days rather than 180 days.	None at this time	None at this time		In progress. Guidance being developed to address multiple changes to 23 U.S.C. 139, including this section.
1309: Accelerating Completion of Complex Projects Within 4 Years	18- FHWA	Potential Rulemaking	Rulemaking on enhanced technical assistance for complex projects within 4 years.	NPRM 6/14 FR None at this time	NPRM 7/14 FR None at this time	✓	In progress. This is a potential rulemaking, which is under consideration for inclusion in the "clean-up" rulemaking as referenced in the Section 1305 rulemaking effort, which is expected July 2014.	
	19- FHWA	FTA	Guidance	Guidance on enhanced technical assistance for complex projects within 4 years.	None at this time	None at this time		In progress. Guidance being developed to address multiple changes to 23 U.S.C. 139, including this section.

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1310: Integration of Planning and Environmental Review	20- FHWA	FTA	Potential Guidance	Guidance on integration of planning and environmental review.	None at this time	None at this time		In progress. Potential for further guidance.
	21- FHWA	FTA	Rulemaking	Rulemaking on integration of planning and environmental review.	NPRM 11/20/13 FR None at this time	NPRM 5/31/14 FR None at this time	✓	In progress. A determination has been made not to incorporate Sec. 1310 into the planning rulemaking. A separate standalone rulemaking is in progress.
1311: Development of Programmatic Mitigation Plans	22- FHWA	FTA	Rulemaking	Rulemaking on integration of planning and environmental review.	NPRM 11/20/13 FR None at this time	NPRM 2/28/14 FR None at this time	✓	In progress. This section has been incorporated into the planning rulemaking, which will be circulated for interagency review shortly. The schedule for publication is contingent on interagency review.
1312: State Assumption of Responsibility for Categorical Exclusions (CEs)	23- FHWA		Guidance	Update guidance on state assumption of responsibility for categorical exclusions.	None at this time	9/30/13		Complete. FHWA issued MOU template on 9/30/13.

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1313: Surface Transportation Project Delivery Program	24- FHWA	FTA	<b>Required Rulemaking</b>	Rulemaking to update regulations.	NPRM 5/24/13 FR 6/28/13	NPRM 8/30/13 FR 6/14 (FR 6/28/13)	✓	In progress. NPRM is complete, and Department is now considering comments received for incorporation into final rule. Final rule deadline will not be met; DOT anticipates a final rule in June 2014.
25- FHWA	FTA	Guidance	Update guidance on state assumption of responsibility for categorical exclusions.	None at this time	None at this time			In progress. Development of this guidance is in progress. It will be released after the final rule for section 1313 has been issued.
1314: Application of CEs for Multimodal Projects	26-OST	FTA, FHWA	Guidance	Q&A guidance documents on the application of CEs for multimodal projects.	None at this time.	2/14		In progress. Q&A document has been finalized and will be posted shortly.

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Section Title	Lead	Other Modes Involved	Type of Deliverable/ Action*	Deliverable According to the Department	Initial Completion Date (Bold = Statutory Deadline)	Updated Completion Date (Bold = Statutory Deadline)	Ratemaking Completion Dates(s) Delayed	Status According to the Department
1315: CES in Emergencies	27- FHWA	FTA, OST	<b>Required Ratemaking</b>	Ratemaking to quality emergency repair projects as CES.	NPRM 10/30/12 FR 2/19/13	NPRM 10/1/12 (NPRM 10/30/12), FR 2/19/13		Complete. NPRM was published on 10/1/12. Final rule was published in Federal Register, effective as of 2/19/13.
28-	OST	FHWA	<b>Required Ratemaking</b>	Regulation on evaluation of alternatives to facilities repeatedly requiring repair or reconstruction.	NPRM 11/20/13 FR None at this time	NPRM 5/14 FR None at this time	✓	In progress. Agencies solicited comments on regulatory approach in NPRM for Section 1315(a). FHWA and FTA will be issuing rules separately. FHWA plans to implement the requirement in its Asset Management ratemaking, with an NPRM scheduled to be published in spring 2014.
29- FTA	OST		<b>Required Ratemaking</b>	Regulation on evaluation of alternatives to facilities repeatedly requiring repair or reconstruction.	Interim Final Rule (IFR) 4/1/13	IFR 3/29/13 FR 6/4		In progress. FTA implemented the requirement through rulemakings for new Emergency Relief program (49 U.S.C. 5324). It issued an IFR on 3/29/13. A policy decision was made to include the requirements in a final rule on emergency relief rather than to incorporate the regulation into the transit asset management rule.
30- FTA	OST		<b>Required Ratemaking</b>	Regulation on evaluation of alternatives to facilities repeatedly requiring repair or reconstruction.	ANPRM 6/20/13 FR 10/1/14	N/A		Canceled. No longer anticipated as part of the Asset Management ratemaking. A policy decision was made to include the requirements in a final rule on emergency relief rather than to incorporate them into the new Transit Asset Management program (49 U.S.C. 5326). Please see item 29 for status of the rulemaking.

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Section Title	Lead	Other Modes Involved	Type of Deliverable/Action*	Deliverable According to the Department	Initial Completion Date (Bold = Statutory Deadline)	Updated Completion Date (Bold = Statutory Deadline)	Rulemaking Completion Dates(s) Delayed	Status According to the Department
1316: CEs for Projects Within the Right-of-Way	31- FHWA	FTA	<b>Required Rulemaking</b>	Promulgate regulations defining CE projects in operational right-of-way.	NPRM 2/28/13 Implement 3/30/13	NPRM 2/28/13 (Implement 3/30/13)	FR 1/13/14	Complete. Combined rulemaking with Section 1317. NPRM published on 2/28/13. Final rule published 1/13/14.
1317: CE For Projects of Limited Federal Assistance	32- FHWA	FTA	<b>Required Rulemaking</b>	Promulgate regulations to designate projects of limited Federal assistance as CES within 180 days of enactment.	NPRM 2/28/13 Implement 3/30/13	NPRM 2/28/13 (Implement 3/30/13)	FR 1/13/14	Complete. Combined rulemaking with 1316. NPRM published on 2/28/13. Final rule published 1/13/14.
1318: Programmatic Agreements and Additional Categorical Exclusions	33- FHWA	FTA, OST	Initiative: Survey & Solicitation	Survey uses of CES by DOT since 2005; publish review of survey, and solicit requests for new CES.	11/30/12	12/27/2012 (1/13/12)		Complete. Survey conducted and report posted on 12/7/2012. Federal Register notice on the availability of the report was published 12/13/2012.
34- FHWA	FTA, OST	<b>Required Rulemaking</b>		Rulemaking to add new CES suggested by others and as listed in statute.	NPRM 1/29/13 FR 10/1/14	NPRM 9/1/13 (NPRM 1/29/13)	FR 9/14	In progress. NPRM published 9/19/13. Final rule anticipated 9/20/14.

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1319: Accelerated Decisionmaking in Environmental Reviews	35- FHWA	FTA	Guidance	Interim guidance on accelerated decisionmaking on environmental reviews.	1/14/13	1/14/13	Complete. Internal interim guidance jointly issued by FHWA and FTA on 1/14/13.	
	36- FHWA	FTA	Potential Rulemaking	Regulation on accelerated decisionmaking on environmental reviews.	NPRM 6/14 FR None at this time	NPRM 7/14 FR None at this time	✓	In progress. This rulemaking is currently under consideration. It may be addressed as part of the 'clean-up' rulemaking as referenced in Section 1305 rulemaking effort.
1320: Memoranda of Agency Agreements for Early Coordination	37- FHWA	FTA	Guidance	Guidance on memoranda of agency agreements for early coordination.	None at this time	None at this time	In progress. FHWA developed an MOA with USCG and a joint MOU among the Federal Railroad Administration, FTA, and FHWA, and USCG—both are consistent with the goals of interagency cooperation and early coordination. Both documents were signed 1/14/14.	Guidance to State and local governments on developing MOAs is in progress.
	38- FHWA	FTA	Potential Rulemaking	Rulemaking on memoranda of agency agreements for early coordination.	NPRM 1/20/13 FR None at this time	N/A	Canceled. This was a potential rulemaking, and is no longer anticipated.	

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1321: Environmental Procedures Initiative	39- OST	FHWA, FTA	Report	For formula grant funds distributed, the Secretary shall establish an initiative to review and develop consistent procedures for environmental permitting and report results.	None at this time	None at this time		In progress. No additional details provided by the Department.
1323: Review of Federal Project and Program Delivery	40- FHWA	Congressional Report	Report to Congress on results of review of Federal project and program delivery, pre-2005 projects.	10/1/13	11/6/13 (10/1/13)			Complete. Report submitted 11/6/13.
41- FHWA		Congressional Report	Report to Congress on results of review of Federal project and program delivery, post-2005 projects.	10/1/17	10/1/17			In progress. No additional details provided by the Department.
42- FHWA	FTA	Congressional Report	Report to Congress on types and justifications for additional categorical exclusions under sections 1316-1317.	10/1/14	10/1/14			Not started. Waiting for the Final Rule for Sections 1316 and 1317 effective date of 2/12/14 to begin.

Source: OIG compilation of information provided by DOT, including the Office of the Secretary, FHWA, and FTA. We have not independently validated DOT's progress provided in this attachment.

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Senator BOXER. Thanks.

So I am going to put a few things in the record, then I am going to ask some questions. The first thing I want to put in is a letter to us from the American Road and Transportation Builders Association. Without objection, we will put their comments in the record.

Then there are three publications. One is a Reuter's article saying scientists are surer than ever that climate change is real and happening; a new peer-reviewed report finds at least 95 percent likely that human activities such as burning of fossil fuels, chiefly, are the main cause.

And then the next one is a NOAA report that says, industrial carbon pollution reached its highest level in human history in 2013. And then the third one is the Guardian article, suggestions that climate change has slowed look only at isolated indicators like surface temperature and ignore other important evidence concerning the overall heating of the globe, including rapid heating of the world's oceans.

[The referenced information follows:]

**Implementing MAP-21's Provisions to Accelerate Project Delivery****Statement of the  
American Road and Transportation Builders  
Association**

**Submitted to the  
United States Senate  
Committee on Environment and Public Works**

**September 18, 2013**

Chairman Boxer and Ranking Member Vitter, the American Road and Transportation Builders Association (ARTBA) commends you for convening today's hearing. The Moving Ahead for Progress in the 21<sup>st</sup> Century (MAP-21) Act's provisions relating to the acceleration of transportation project delivery are historic reforms, but they must be implemented as intended and warrant a vigorous oversight process.

ARTBA's membership includes public agencies and private firms and organizations that own, plan, design, supply and construct transportation projects throughout the country. The industry we represent generates more than \$380 billion annually in U.S. economic activity and sustains more than 3.3 million American jobs. ARTBA has a long history of working to find common-sense solutions to environmental issues and has been pleased to work with this committee on many prior occasions to fashion policies effectively balancing the desire to protect natural resources with the efficient delivery of transportation improvements.

ARTBA recognizes that regulations play a vital role in protecting the public interest in the transportation review and approval process. They provide a sense of predictability and ensure a balance between meeting our nation's transportation needs and protecting vital natural resources. These goals, however, do not have to be in conflict. The most successful transportation streamlining provisions have been process-oriented and essentially found a path for regulatory requirements to be fulfilled in a smarter and more efficient manner.

According to a report by the U.S. Government Accountability Office (GAO) prior to the enactment of MAP-21, as many as 200 major steps are involved in developing a transportation project, from the identification of the project need to the start of construction. The same report also shows it typically takes between nine and 19 years to plan, gain approval of, and construct a

new major federally-funded highway project. This process involves dozens of overlapping state and federal laws, including: the National Environmental Policy Act (NEPA); state NEPA equivalents; wetland permits; endangered species implementation; and clean air conformity.

Both parties recognized that this is simply too long to make the public wait for transportation projects that improve mobility and safety. As such, finding meaningful ways to expedite this process was a centerpiece of MAP-21's policy reforms. MAP-21 passed with overwhelming bipartisan majorities in the House and Senate—providing an unmistakable referendum on the need to deliver transportation improvements more quickly. MAP-21 accomplishes this goal without sacrificing necessary regulatory safeguards protecting public health and the environment.

We appreciate this opportunity to report on what we have seen in Washington, D.C., and the states on the implementation of MAP-21's project delivery reforms in the 14 months since the new law was enacted. Unfortunately, much of the implementation of MAP-21's environmental streamlining provisions remains a work in progress.

#### **Expansion of the Use of Categorical Exclusions (CEs)**

One of the most significant changes to existing law in MAP-21 is an expansion of the use of CEs during the environmental review process. A CE is used when projects create minimal impacts on the environment. The difference between a CE and an EA or EIS is multiple years added on to the amount of time it takes to complete a project review. Under MAP-21, many sorts of routine projects are now automatically classified as CEs, these include rehabilitation and repair projects, projects within an existing right-of-way, projects with minimal federal resources and projects undertaken as a result of an emergency situation. Expanding the use of CEs to these additional areas should enable local governments to have more certainty as to when a CE can be used and also allow routine projects to be undertaken without burdensome, unnecessary levels of review.

MAP-21 also calls for the development of CE guidelines for projects being constructed in response to an emergency or natural disaster. To qualify for CE status, such a project must be of the same mode/type and in the same right-of-way as the facility it is replacing and started within two years after the emergency/natural disaster. This newly-established CE was an integral element in the rebuilding of the I-5 Skagit River Bridge in Washington which collapsed earlier this year. The bridge was rebuilt in just under four months—substantially less time than it would have taken if a CE was not available.

NEPA was never meant to be a statute enabling delay, but rather a vehicle to promote balance. While the centerpiece of such a balancing is the environmental impacts of a project, other factors must be considered as well, such as the economic, safety, and mobility needs of the affected area and how a project or any identified alternative will affect those needs. Allowing certain types of projects to be classified as CEs is a very effective way of reducing delay in the review and approval process by ensuring projects with minimal environmental impacts are not put through a needlessly long regulatory process.

With regard to the implementation of MAP-21's reforms, the CE area has seen the most progress to date. As previously mentioned, the emergency situation CE has already been finalized and put

to use. Further, regulations detailing CEs for projects within an existing right-of-way and projects using limited federal resources have also been proposed.

As the U.S. Department of Transportation (U.S. DOT) continues to develop the new CE reforms contained in MAP-21, ARTBA would advise that all newly created CEs must be implemented in a programmatic fashion. In other words, once an activity is determined to fall within the broad scope and type of action noted as being a CE, no further agency review should be required. An agency's intent should be, to the maximum extent practicable, to use a broad approach in determining projects as eligible for CE status based on the provisions of MAP-21. In conjunction with increasing the amount of activities qualifying for CE status, drastically reducing the amount of review involved in the CE designation process would free up resources for more complicated environmental assessments (EAs) and environmental impact statements (EISs). There would also be more resources available for permitting decisions.

#### **Simplification of the EIS Process and Reduction of Duplicative Work**

MAP-21 simplifies the EIS process by allowing a lead agency to list the corrections between a draft EIS and a final EIS—as opposed to producing an entirely new document. Also, lead agencies, to the maximum extent possible, are directed to combine final EISs and records of decision into a single document. Preventing the needless production of multiple additional documents should substantially reduce the amount of time involved in EISs while maintaining all existing environmental protections.

MAP-21 also allows for the option of using materials developed for the transportation planning process during NEPA review. Like the EIS paperwork reforms, this provision attempts to reduce delay by allowing, where appropriate, the use of material already created instead of “reinventing the wheel.” MAP-21 also encourages the use of programmatic agreements, spelling out requirements in the beginning of the review and approval process, rather than over a longer period of time. By outlining requirements early in the process, programmatic agreements provide a chance to give transportation planners increased certainty throughout the overall review process.

MAP-21’s provisions relating to EIS simplification and using transportation planning materials during NEPA review have yet to be fully implemented. Also, when asked, ARTBA members reported little exposure to these aspects of MAP-21 because there have not been new projects large enough to warrant an EIS. As members of this committee well know, large-scale transportation improvement projects require a long-term source of funds and the continued uncertainty about the Highway Trust Fund’s revenue outlook makes it harder for states to advance these types of projects.

#### **Delegation of Environmental Review Responsibilities**

Under the Safe, Accountable, Flexible Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), a pilot program was established allowing five states (Calif., Alaska, Ohio, Texas and Oklahoma) to assume the role of the federal government during the NEPA process. MAP-21 expands the opportunity to participate in the program to all states. States choosing to

take part would conduct their own environmental reviews, potentially saving time as a result of not having to go through multiple federal agencies.

Of the five states allowed to participate in the delegation pilot program under SAFETEA-LU, only California chose to do so. While the reasons for non-participation thus far by the other states have varied, potential liability and litigation costs were an overriding issue, as the state would also be assuming federal responsibilities for litigation over any project where delegation was used. Since MAP-21 was enacted, the state of Texas has joined California in applying for delegation of federal environmental responsibilities. ARTBA supported the applications of both states in comments submitted to U.S. DOT.

#### **Moving Forward on MAP-21 Implementation**

While ongoing concerted efforts by U.S. DOT and congressional oversight are essential to implementing the new law, the fact remains that MAP-21's reforms will only be effective to the extent to which they are put to work. Many of the new tools MAP-21 offers to improve project delivery are optional, as opposed to mandatory. Parties (U.S. DOT and state departments of transportation) must choose to invoke these opportunities in order to reap their benefits—simply providing the ability to complete regulatory reviews in a more efficient manner in no way guarantees that authority would be utilized. For example, the following provisions of MAP-21 are not automatic, but rather must be triggered by the party that is given the authority:

- New CEs—MAP-21 creates multiple classes of new CEs, but states must create projects and chose to apply for CE status for those projects;
- Programmatic Agreements—MAP-21 encourages greater use of programmatic agreements, but the choice to use them ultimately rests with the states;
- State Delegation of Environmental Responsibilities—MAP-21 gives every state the option to apply for delegation of some or all federal responsibilities, but the states must apply for delegation in order to take advantage of it.
- Greater Lead Agency Authority for U.S. DOT—MAP-21 grants U.S. DOT greater authority to enter into schedules with participating agencies, but DOT must affirmatively chose to exercise this authority
- Completion of an EIS within Four Years—MAP-21 allows U.S. DOT to set a schedule for completion within two years of any project which has already been in the EIS process for two years or more. However, this schedule must be affirmatively requested by a project sponsor for it to take effect.

Thus, participants at the federal and state level bear a responsibility on ensuring MAP-21's reforms are taken advantage of by actually availing themselves of the new methods to improve the delivery process. The extent to which they do so will directly impact the amount of benefits MAP-21 is able to provide in reducing delays in the transportation project delivery process.

Beginning with the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21) and SAFETEA-LU and continuing through MAP-21, members of both parties have highlighted the need to ensure needless bureaucratic delays do not impede the delivery of mobility and safety enhancements. MAP-21 represents an unprecedented and comprehensive approach to reforming the transportation project delivery process and the first step in this effort must be to ensure MAP-21

project delivery reforms are implemented in a timely manner that is consistent with the letter and spirit of the new law.

In conclusion, ARTBA would once again like to thank Chairwoman Boxer and Ranking Member Vitter for holding this hearing on the implementation of MAP-21's provisions aimed at accelerating the project delivery process. These provisions represent a significant, bipartisan legislative achievement and we are confident they will benefit the nation's transportation infrastructure network for years to come. ARTBA stands ready to help this committee continue the implementation of MAP-21 in a manner which will not only accelerate the delivery of transportation improvements, but also safeguard our nation's natural resources.

9/18/13 Experts surer of manmade global warming but local predictions elusive | Reuters

**ARTICLE COMMENTS (20)**

## Experts surer of manmade global warming but local predictions elusive

By Environment Correspondent Alister Doyle  
OSLO | Fri Aug 16, 2013 10:16am EDT

(Reuters) - Climate scientists are surer than ever that human activity is causing global warming, according to leaked drafts of a major U.N. report, but they are finding it harder than expected to predict the impact in specific regions in coming decades.

The uncertainty is frustrating for government planners: the report by the Intergovernmental Panel on Climate Change (IPCC) is the main guide for states weighing multi-billion-dollar shifts to renewable energy from fossil fuels, for coastal regions considering extra sea defenses or crop breeders developing heat-resistant strains.

Drafts seen by Reuters of the study by the U.N. panel of experts, due to be published next month, say it is at least 95 percent likely that human activities - chiefly the burning of fossil fuels - are the main cause of warming since the 1950s.

That is up from at least 90 percent in the last report in 2007, 66 percent in 2001, and just over 50 percent in 1995. It also shifts the arguments by a small minority of scientists that natural forces are to blame.

That shifts the debate onto the extent of temperature rises and the likely impacts, from manageable to catastrophic. Governments have agreed to work out an international deal by the end of 2015 to rein in rising emissions.

[www.reuters.com/article/2013/08/16/us-climate-report-idUSBRE97F0KM20130816](http://www.reuters.com/article/2013/08/16/us-climate-report-idUSBRE97F0KM20130816)

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"We have got quite a bit more certain that climate change ... is largely manmade," said Reto Knutti, a professor at the Swiss Federal Institute of Technology in Zurich. "We're less certain than many would hope about the local impacts."

And gauging how warming would affect nature, from crops to fish stocks, was also proving hard since it goes far beyond physics. "You can't write an equation for a tree," he said.

The IPCC report, the first of three to be released in 2013 and 2014, will face intense scrutiny, particularly after the panel admitted a mistake in the 2007 study which wrongly predicted that all Himalayan glaciers could melt by 2035. Experts say the error far overestimated the melt and might have been based on a misreading of 2350.

The new study will state with greater confidence than in 2007 that rising manmade greenhouse gas emissions have already meant more heatwaves. But it is likely to play down some tentative findings from 2007, such as that human activities have contributed to more droughts.

Almost 200 governments have agreed to try to limit global warming to below 2 degrees Celsius (3.6 Fahrenheit) above pre-industrial times, seen as a threshold for dangerous changes including more droughts, extinctions, floods and rising seas that could swamp coastal regions and entire island nations.

The report will flag a high risk that global temperatures will increase this century by more than that level, and will say that evidence of rising sea levels is now "unequivocal".

For all that, scientists say it is proving harder to pinpoint local impacts in coming decades in a way that would help planners.

Drew Shindell, a NASA climate scientist, said the relative lack of progress in regional predictions was the main disappointment of climate science since 2007.

"I talk to people in regional power planning. They ask: 'What's the temperature going to be in this region in the next 20-30 years, because that's where our power grid is?'" he said.

"We can't really tell. It's a shame," said Shindell. Like the other scientists interviewed, he was speaking about climate science in general since the last IPCC report, not about the details of the latest drafts.

## WARMING SLOWING

The panel will try to explain why global temperatures, while still increasing, have risen more slowly since about 1998 even though greenhouse gas concentrations have hit repeated record highs in that time, led by industrial emissions by China and other emerging nations.

An IPCC draft says there is "medium confidence" that the slowing of the rise is "due in roughly equal measure" to natural variations in the weather and to other factors affecting energy reaching the Earth's surface.

Scientists believe causes could include: greater-than-expected quantities of ash from volcanoes, which dims sunlight; a decline in heat from the sun during a current 11-year solar cycle; more heat being absorbed by the deep oceans; or the possibility that the climate may be less sensitive than expected to a build-up of carbon dioxide.

"It might be down to minor contributions that all add up," said Gabriele Hegerl, a professor at Edinburgh University. Or maybe, scientists say, the latest decade is just a blip.

The main scenarios in the draft, using more complex computer models than in 2007 and taking account of more factors, show that temperatures could rise anywhere from a fraction of 1 degree Celsius (1.8 Fahrenheit) to almost 5C (9F) this century, a wider range at both ends than in 2007.

The low end, however, is because the IPCC has added what diplomats say is an improbable scenario for radical government action - not considered in 2007 - that would require cuts in global greenhouse gases to zero by about 2070.

Temperatures have already risen by 0.8C (1.4F) since the Industrial Revolution in the 19th century.

Experts say that the big advance in the report, due for a final edit by governments and scientists in Stockholm from September 23-26, is simply greater confidence about the science of global

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warming, rather than revolutionary new findings.

#### SEA LEVELS

"Overall our understanding has strengthened," said Michael Oppenheimer, a professor at Princeton University, pointing to areas including sea level rise.

An IPCC draft projects seas will rise by between 29 and 82 cm (11.4 to 32.3 inches) by the late 21st century - above the estimates of 18 to 59 cm in the last report, which did not fully account for changes in Antarctica and Greenland.

The report slightly tones down past tentative findings that more intense tropical cyclone are linked to human activities. Warmer air can contain more moisture, however, making downpours more likely in future.

"There is widespread agreement among hurricane scientists that rainfall associated with hurricanes will increase noticeably with global warming," said Kerry Emanuel, of the Massachusetts Institute of Technology.

"But measuring rainfall is very tricky," he said.

(Editing by Mark Trevelyan)

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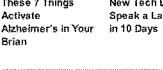
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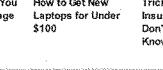
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**CO<sub>2</sub> at NOAA's Mauna Loa Observatory reaches new milestone: Tops 400 ppm**

This story entered on 10th May, 2013 03:45:06 PM MST



Photo credit: Mary Miller, Exploratorium

NOAA's Mauna Loa Observatory after a snowstorm.

On May 9, the daily mean concentration of carbon dioxide in the atmosphere of Mauna Loa, Hawaii, surpassed 400 parts per million (ppm) for the first time since measurements began in 1958. Independent measurements made by both NOAA and the Scripps Institution of Oceanography have been approaching this level during the past week. It marks an important milestone because Mauna Loa, as the oldest continuous carbon dioxide (CO<sub>2</sub>) measurement station in the world, is the primary global benchmark site for monitoring the increase of this potent heat-trapping gas.

Carbon dioxide pumped into the atmosphere by fossil fuel burning and other human activities is the most significant greenhouse gas (GHG) contributing to climate change. Its concentration has increased every year since scientists started making measurements on the slopes of the Mauna Loa volcano more than five decades ago. The rate of increase has accelerated since the measurements started, from about 0.7 ppm per year in the late 1950s to 2.1 ppm per year during the last 10 years.

"That increase is not a surprise to scientists," said NOAA senior scientist Pieter Tans, with the Global Monitoring Division of NOAA's Earth System Research Laboratory in Boulder, Colo. "The evidence is conclusive that the strong growth of global CO<sub>2</sub> emissions from the burning of coal, oil, and natural gas is driving the acceleration."

Before the Industrial Revolution in the 19th century, global average CO<sub>2</sub> was about 280 ppm. During the last 800,000 years, CO<sub>2</sub> fluctuated between about 180 ppm during ice ages and 280 ppm during interglacial warm periods. Today's rate of increase is more than 100 times faster than the increase that occurred when the last ice age ended.

It was researcher Charles David Keeling of the Scripps Institution of Oceanography, UC San Diego, who began measuring carbon dioxide at Mauna Loa in 1958, initiating what is known as the "Keeling Curve." His son, Ralph Keeling, also a geochemist at Scripps, has continued the Scripps measurement record since his father's death in 2005.

"There's no stopping CO<sub>2</sub> from reaching 400 ppm," said Ralph Keeling. "That's now a done deal. But what happens from here on still matters to climate, and it's still under our control. It mainly comes down to how much we continue to rely on fossil fuels for energy."

NOAA scientists with the Global Monitoring Division have made around-the-clock measurements there since 1974. Having two programs independently measure the greenhouse gas provides confidence that the measurements are correct. Moreover, similar increases of CO<sub>2</sub> are seen all over the world by many international scientists. NOAA, for example, which runs a global, cooperative air sampling network, reported last year that all Arctic sites in its network reached 400 ppm for the first time. These high values were a prelude to what is now being observed at Mauna Loa, a site in the subtropics, this year. Sites in the Southern Hemisphere will follow during the next few years. The increase in the Northern Hemisphere is always a little ahead of the Southern Hemisphere because most of the emissions driving the CO<sub>2</sub>

[www.esrl.noaa.gov/gmd/news/7074.html](http://www.esrl.noaa.gov/gmd/news/7074.html) 1/2

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Increase take place in the north. Once emitted, CO<sub>2</sub> added to the atmosphere and oceans remains for thousands of years. Thus, climate changes forced by CO<sub>2</sub> depend primarily on cumulative emissions, making it progressively more and more difficult to avoid further substantial climate change.

## On the Web:

NOAA carbon dioxide data: <http://www.esrl.noaa.gov/gmd/ccgg/trends/weekly.html>

Scripps Institution of Oceanography carbon dioxide data: <http://keelingcurve.ucsd.edu/>

NOAA's Mauna Loa Observatory: <http://www.esrl.noaa.gov/gmd/obop/mlo>

Animation (carbon dioxide levels over 800,000 years): <http://www.esrl.noaa.gov/gmd/ccgg/trends/history.html>

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More Information:<http://www.esrl.noaa.gov/gmd/ccgg/trends/weekly.html>

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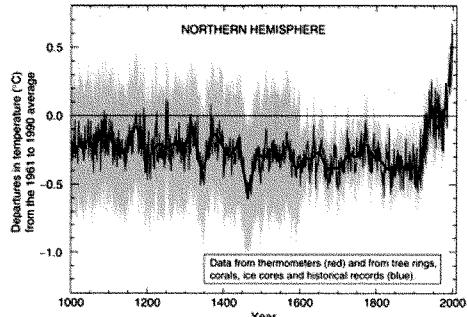
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## Climate change slowdown is due to warming of deep oceans, say scientists

Climate sceptics have seized on a pause in warming over the past five years, but the long-term trend is still upwards

**Fiona Harvey**, environment correspondent  
The Guardian, Monday 22 July 2013 12.57 EDT



Temperature in the northern hemisphere since 1000 CE. Natural variation in the climate cycle does not contradict climate scientists' predictions. Graph: IPCC report

A recent slowdown in the upward march of global temperatures is likely to be the result of the slow warming of the deep oceans, British scientists said on Monday.

Oceans are some of the Earth's biggest absorbers of heat, which can be seen in effects such as sea level rises, caused by the expansion of large bodies of water as they warm. The absorption goes on over long periods, as heat from the surface is gradually

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circulated to the lower reaches of the seas.

Temperatures around the world have been broadly static over the past five years, though they were still significantly above historic norms, and the years from 2000 to 2012 comprise most of the 14 hottest years ever recorded. The scientists said the evidence still clearly pointed to a continuation of global warming in the coming decades as greenhouse gases in the atmosphere contribute to climate change.

This summer's heatwave, the most prolonged period of hot weather in the UK for years, has not yet been taken into account in their measurements.

Peter Stott of the Met Office said computer-generated climate models all showed that periods of slower warming were to be expected as part of the natural variation of the climate cycle, and did not contradict predictions. Given that variation, current temperatures are within expectations.

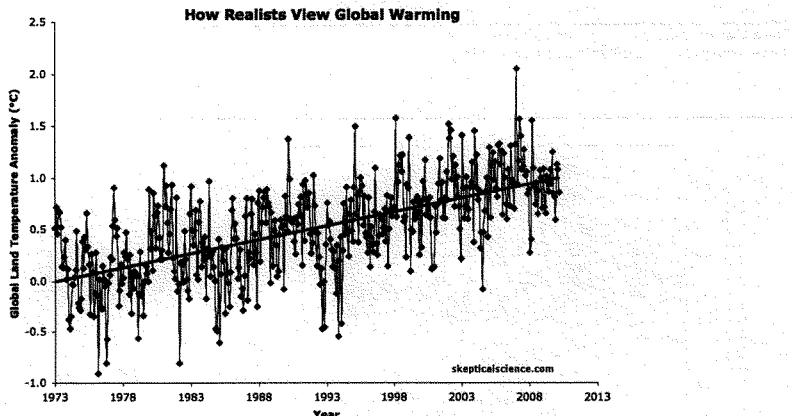


Figure 1: BEST land-only surface temperature data (green) with linear trends applied to the timeframes 1973 to 1980, 1980-1988, 1988-1995, 1995-2001, 1998-2005, 2002-2010 (blue), and 1973-2010 (red)

As well as the heating of the deep oceans, other factors have played a significant part in slowing temperature rises. These have included the solar minimum – when the sun is less active and generating slightly less heat, as occurred in 2008/2009 – and a series of small volcanic eruptions, including that of Iceland's Eyjafjallajökull volcano in 2010. Ash from volcanoes reflects light back into space, and major eruptions in the past have had a

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severe, albeit temporary, cooling effect.

Despite the slowdown in warming, by 2060 the world is still likely to have experienced average temperatures of more than 2C above pre-industrial levels – a threshold that scientists regard as the limit of safety, beyond which climate change impacts are likely to become catastrophic. [Prof Rowan Sutton](#), director of climate research at the National Centre for Atmospheric Research at Reading University, said the current pause would only delay reaching this point by five to 10 years.

The "pause" in the rise of global temperatures has been seized on by climate sceptics, however, who have interpreted it as proof that the science of climate change is mistaken. But despite the slowdown in warming, the warmest years on record were 1998, 2005 and 2010, according to the US National Oceanic and Atmospheric Administration.

Prof Sutton said more research was needed on the effects of warming on the deep oceans, as observations of deep ocean temperatures have only been carried out in detail over the past decade and more are needed. Higher temperatures could not only have a devastating effect on marine life, he said, but could also contribute to increases in sea levels as sea water expands.

The Met Office warned early in the summer that the [UK could be in for a decade of "washout" summers](#), like those of the past six years, because of the effect of climate change on global weather systems, partly as a result of changes in wind patterns caused by the melting Arctic.

But no sooner had the meteorologists made their prediction than the weather bucked this trend, with a shift in the Atlantic's jet stream air circulation system giving rise to high-pressure weather fronts and a long period of settled sunny weather.

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Senator BOXER. So then as usual, Senator Inhofe and I will have our articles in the record, and people can make their own decisions on where they want to stand.

I want to start with you, Mr. Ashe. You talked about your dad. My dad said, get it done.

[Laughter.]

Senator BOXER. He said, get it done. Do it right, don't leave anything out, work hard, get it done. So I approach this in a very simple way, get it done. And here is the thing. I assume that you read Section 1306 of the law, which gives you more time. Have you read that section?

Mr. ASHE. I have.

Senator BOXER. OK. So I want for the record to show that when we worked together, it was hard, we did come from different places. But at the end of the day, we did say that very clearly, if there was no fault of an agency, and there wasn't the information necessary to make the decision, and they didn't have the ability to finish their work and there is significant new information, I mean, we fought over these words. Significant new information, or circumstances including a major modification.

The point is, I hear you. But I honestly think the attitude that you are showing to me today is one that is premature. Because I think we have handled your problem here. And you are absolutely right when you say, the beauty of this and what we did is to make sure that every agency is working with the other one. This is what we are trying to achieve. This is why I like this reform. We have EPA, Corps of Engineers, Fish and Wildlife, NOAA, Department of Transportation, all subjected to fines.

But let's be clear: not one penny of fine until 180 days after the mutually agreed-upon schedule has not been met. Let me say that again. There is a mutually agreed-upon schedule by all these folks, am I right, Mr. Come? That is what the law says. And not until 180 days after you miss the deadline do fines kick in.

So I guess my question to you is, are you concerned because of the way DOT is proceeding? Are you concerned that this exception isn't broad enough? Do you have some ideas to us that say, make it a broader exception? What are you really worried about here?

Mr. ASHE. Thank you, Chairman Boxer. I guess I would go back to my statement. I think with the financial penalty provisions, and they haven't been exercised, they haven't had to be exercised, I think that what that tells me is the streamlining, the emphasis on cooperative work, the emphasis on programmatic level planning, that is the solution.

I think that what I am concerned about is that if those financial penalty provisions are exercised, they will have an extraordinarily cooling effect. They will destroy years and years of work on building productive relationships between agencies.

Senator BOXER. But do you believe that these timetable are agreed upon by your agency and every other agency at the beginning of the process? That is what has to happen. Do you agree with that, that that is the process right now? You have to sign off on the timetable.

Mr. ASHE. No, not necessarily do I have to sign off on the timetable. The regulations that are being developed provide a timetable

under which we would presumably have to act. So I think that what we are talking about here again is a process, is it a process of collaboration?

Senator BOXER. I am going to interrupt you. We have a disagreement on what the law says. And we are going to get you the section of the law. We intend that all the agencies come together and there is a mutually agreed-upon timetable that is signed off by all the parties involved.

Now, you don't agree with that, so there is no point in continuing this line of question. Why don't I show you? I have the cite for you. Bring me the cite, because I think when you reach the cite, you will understand. You have the power, along with all the other agencies involved, to sign off on the timetable.

Now, President Obama has been very, very clear. This is what he said in an Executive order. I want to make sure that you all agree with him who work for him. And if you don't, this is your chance to say you don't agree with him. It is very important. So listen. I am going to ask the three of you.

He issued an Executive order to expedite permitting for infrastructure projects for States: "Our Federal permitting and review processes must provide a transparent, consistent and predictable path for both project sponsors and affected communities. They must ensure that agencies set and adhere to timelines and schedule for completion of reviews, set clear permanent performance goals and track progress against those goals."

Does everyone from the Administration agree with what the President has laid out here, and agrees to carry that out?

[No audible response.]

Senator BOXER. OK. Well, if I could say, because my time has gone over, and I apologize, what we did in this bill, with all the hoopla about it, is carry out the vision that President Obama suggested here, which is going to be in the record for you to look at. And in the law, we gave every agency the power to sign off on the deadline.

Believe me, we had arguments about it. There were some that didn't want to do that, but we managed to do that. So let's continue this. And I just would say that I take what Mr. Come said very seriously. And we are going to keep DOT's feet to the fire on this, because this has to be done, because we have to do another bill, another highway bill. And if things aren't going well here, it is going to create problems for us.

Thank you, Senator Vitter. I apologize, everyone who needs an extra minute has it.

Senator VITTER. Thank you, Madam Chair, and I certainly agree with what you are saying. Let me further that discussion a little bit. There was a fair amount of testimony, particularly from Mr. Ashe and Ms. Sutley, which talked about overall statistics and suggested this isn't a big problem, because overall the average is here, or so many non-controversial projects move this quickly.

What we are really focused on, I think everybody knows, are major transportation projects. And those are relatively few in number, but they are enormously important in impact. I don't want that to be lost. So let's focus on the real issue, which is major highway projects.

Now, in those major highway projects, the average delivery time is 14 years from start to finish. In those major highway projects, the average time for environmental review is 8 years. And that is up from 3 and a half years just in 2000. And in those major highway projects, the average EIS went from 22 pages when that process started to over 1,000 pages today.

So my first question is to all of you: Does anyone think that reality today on major highway projects is appropriate?

Mr. PORCARI. Senator Vitter, if I may start, we don't think it is appropriate and we don't think it is the reality for all projects. I come at this as a practitioner, I have twice served as a State DOT secretary in Maryland, delivering major projects, multi-billion dollar projects and smaller ones. The process does not have to be that long. I mentioned the Tappan Zee example where a very complicated environmental impact statement, with concurrence from all the environmental resource agencies and others was basically done in 12 months or less. That requires a lot of things: top-level elected official support; a project financing plan; front-loading the process so all the stakeholders are actually working together and we understand each other's needs and interests from the beginning, and a real commitment to getting it done.

One of the venues we have for that, the President put in place with the Permits Rapid Response Team that Nancy mentioned, she and I co-chair that. It meets bi-weekly. Everyone is around the table. We are working our way in a positive way to a solution for very complicated projects. Because as you point out, these are the game-changer projects.

Senator VITTER. Right. So just to underscore, Mr. Porcari, you agree that those average figures I cited, which are accurate, those shouldn't be the averages. We should bring those averages way down.

Mr. PORCARI. We should absolutely bring them down. And again, my contention is we could have measurably better outcomes and a shorter and more predictable process at the same time.

Senator VITTER. Does anyone disagree that on major highway projects we should absolutely bring those averages way down?

[No audible response.]

Senator VITTER. OK. There was also a lot of discussion about 1306, which is what we are talking about, and a lot of concern, again, particularly from Mr. Ashe and Ms. Sutley, about some of these provisions. I just want to underscore again, we are here to talk about implementation. Mr. Come, isn't it correct that the provision that they are so concerned about has not been implemented? There have been no fines, and in fact, there is no concrete implementation plan yet at DOT?

So I just want to make clear that these are fears, this is not experience, is that accurate?

Mr. COME. Correct. That is not a provision that has been fully implemented at this time.

Senator VITTER. And in fact, has any agency been fined under that section?

Mr. COME. None that I am aware of.

Senator VITTER. And in fact, has any final guidance been issued by DOT about those sorts of fines, et cetera?

Mr. COME. I don't believe any final guidance has been written.

Senator VITTER. OK. So just to underscore, this is the same pushback we got when we talked about this originally. This is no experience, we are here talking about implementation, this is no experience, positive, negative or anything else about implementation. We have yet to get the implementation.

And then a final question, which I guess is for Mr. Porcari, but it comes out of Mr. Come's work. Shouldn't DOT have dates for all of these implementation requirements of the bill, which we do not have internally yet?

Mr. PORCARI. It is a fair question, Senator. We are developing dates for every part of it. Just the magnitude of the issue, we thank the Committee for MAP-21, which has a lot of great innovations in it. But there are approximately 100 mandates, and somewhere between 50 and 60 rulemakings embedded in MAP-21.

What we have done is prioritize those. We talked about the emergency relief provision being one of the most important.

We are developing dates and timelines for all of those. We have tried to do it in a priority way. I would point out that the staff doing this work is the same staff that is working on the Permits Rapid Response Team. We don't want to deter them from getting these projects out the door.

Senator VITTER. Well, in closing, I would simply encourage you all to finish that work. We are talking about life mottoes, I will throw one into the mix, which is, lots of times things just don't happen until and unless you have an effective deadline. That goes to 1306. Until you have a real deadline, an effective deadline, some consequence if you miss the deadline, sometimes things never happen.

So I also bring that up in terms of encouraging DOT to have dates follow this implementation. Thank you.

Mr. PORCARI. Thank you.

Senator BOXER. I agree with that.

Senator Udall.

Senator UDALL. Thank you, Madam Chair. Since we are all quoting our dads here, my dad used to say get it done, but get it done right. I think the important thing here is sometimes it takes a good solid collaborative effort to get it done right. Sometimes that takes a little bit of time. I think all of you should be congratulated on working in a collaborative way to try to meet deadlines.

But I think the other thing that I am hearing is that timelines with penalties that cannot be altered force you to know. We don't want to see that. We want to see the collaboration continue. I think that is very important.

Ms. Sutley, can you tell me how often projects are delayed because of environmental review, as opposed to those delayed because of funding shortfalls?

Ms. SUTLEY. Based on the work that we have seen in our experience, in most cases the reason that projects are delayed is not related to NEPA specifically, but more related to issues around project funding, project complexity, changes in project scope and other things, as well as that many projects require review at the State and local levels.

Senator UDALL. And if shortfalls are the main cause, have we gained or lost anything by streamlining?

Ms. SUTLEY. Well, we think that effective streamlining, the kind of early collaboration that we have all been talking about, the kind of programmatic reviews that are in the legislation, these are things that are effective in making sure that agencies are leveraging their resources and getting through the process faster. I think there are some other parts of streamlining which cannot address the funding shortfall issues.

Senator UDALL. Thank you.

Director Ashe, is the sequester affecting your ability to do NEPA reviews in an efficient and timely manner?

Mr. ASHE. Senator, as a result of general budget reductions and exacerbated by this sequester, I have 500 fewer employees today than I had 18 months ago. This time next year, it will be 800 fewer employees than I had 2 years ago. And people in the field to build cooperative and trust-based relationships is a significant liability in terms of getting our work done, getting it done promptly, getting it done well.

Senator UDALL. And Director Ashe, in your opinion, is the review process broken, or do we just lack the resources? Will a deadline help overcome that?

Mr. ASHE. I don't believe the process is broken. I believe that as Deputy Secretary Porcari mentioned, and Chair Sutley has mentioned, innovations like the RRT at the Federal level are bringing people together so that we can share common objectives and we can build common objectives. I think that is the key to delivering projects. We need skilled people, we need liaisons between Federal agencies. We are learning these lessons, we are putting them all to work.

That is why I really believe that the notion that somehow environmental review is the enemy here I think is wrong. I think good environmental review supports the development of projects that can be delivered and can be delivered on time. It is when we ignore those things or try to rush through them that I think in the long run we cause delay.

Senator UDALL. And I recognize we are still early in the implementation stage. But how do you anticipate the fines having impacts on your planning and budgeting?

Mr. ASHE. Honestly, I don't know how to plan for them in terms of budgeting. We haven't seen implementation of the provision. But I really believe in my heart of hearts that the Fish and Wildlife Service will never see a penalty under these provisions, because if we are faced with a hard deadline that we can't meet and we are going to face a penalty, then we are going to say no. That will be our default position, would be, well, if you want a quick answer, then the quick answer is not one that you are going to want to hear. So when we are dealing with these kinds of complex projects, it is time, and again, people who have relationships, trust-based relationships that can get us through this.

Senator UDALL. Ms. Sutley, do you have any concerns the reviews are less thorough, complete or impactful because of the provisions in MAP-21?

Ms. SUTLEY. I think that as Mr. Ashe said, the concern is that with those kinds of deadlines, if a deadline is looming, the natural response, I think, would be to cut the review off and get to a no answer. I think we have seen over the life of NEPA and other environmental statutes that the kind of working together, the kind of collaboration and transparency and public input surfaces issues that need to be addressed. When you successfully address those you can reduce the time and the litigation risk associated with projects, so they can move forward.

Senator UDALL. Thank you. Thank you, Madam Chair.

Senator BOXER. Thank you very much.

Senator Inhofe.

Senator INHOFE. Thank you, Madam Chair.

Mr. Porcari, first of all, I want to make sure that you share with your boss, Secretary Foxx, how much we appreciate in Oklahoma his participation, which was really the way that we should be doing things, going to the source and getting a good look. I know he is doing that all over the country. So I appreciate it. He was a big hit in Oklahoma.

Mr. PORCARI. I will be happy to do that.

Senator INHOFE. I would also ask, did you understand what I was trying to get to when I talked about politically speaking, we are talking here that it is important we cover the things we are covering. But the politics is important, as the Chairman knows. We need a bill. And a bill, quite frankly, it is more difficult dealing with Republicans than Democrats in the Senate. But we have overcome that problem in the House.

The point I was trying to get across is, their support was predicated on the assumption that these reforms that we have would be taken care of in a very timely fashion. Did that make sense to you?

Mr. PORCARI. It does, Senator. And I will tell you, we take this very seriously, because we see really a two-fer out of this. We can improve the process and get better outcome.

Senator INHOFE. Good. I agree with that.

Mr. Ashe, the Fish and Wildlife Service has been working with five States' range-wide plan, addressing the Lesser Prairie Chicken, and I will sure be glad when we get that resolved. I understand the Service will receive the latest version today. I believe there is sufficient evidence to avoid a threatened listing, and appreciate the Service extending the final rule until March 14th. I am sure that Senator Udall agrees with me and some others do too, it would be nice if we could get that extended to June 2014.

Service approval of the range-wide plan and the oil and gas CCA as soon as possible, it is really crucial to prevent the threatened listing following submission of the final draft of the range-wide plan today or this week. How early in, let's say October, do you think the Service could issue a judgment on whether to approve the range-wide plan?

Mr. ASHE. Thank you, Senator. As we have spoken about before, I really applaud the five range States, New Mexico, Texas, Colorado, Kansas and Oklahoma, for their work in developing a comprehensive strategy for conservation of the sage grouse. We had agreed on a timeline with the States, cooperatively, sitting down together and working on a timeline. The States are a couple of weeks

behind their timeline in terms of submitting the range-wide plan to us. But we have committed, when they get it to us, we will get them an answer in 10 days.

Senator INHOFE. That is good. That is what I wanted to hear, and I appreciate that very much. I think you should be getting that today. I know that Senator Udall is on top of this, the same as I am.

That is not the only issue, however. I can't let this go without talking about the American Bearing Beetle. On the 15th of April, the Oklahoma Department of Wildlife Conservation sent you a letter asking that the Service revise the American Bearing Beetle recovery plan for the first time in 22 years so we can begin the delisting. I wrote you on July 22d, because the scientific integrity investigation currently underway at the Service involves the American Bearing Beetle in the Service's Tulsa and District Office.

We have not received a response yet. Supervisors at the Tulsa Office overrode the decision of biologists to leave the trap and relocate the trap, that method, until an alternative or a general conservation plan could be reached.

Now we have our landowners, our developers, our farmers in a situation where, in Eastern Oklahoma, they have to withdraw from what they normally would be doing, their drilling, their farming, their activities, pipelines, and so forth, until the Service issues the guidance. So we are kind of in a dilemma there. I would ask if the Service planned on a general conservation plan in December 2013, which is now slipping into April 2014. What will you do to re-evaluate the recovery plan and more immediately expedite Service guidance for economic development in the range of this insect?

I know you have heard this before, but the dilemma of people out there, time costs a lot of money. What do you think?

Mr. ASHE. I will try to respond quickly. There is no disagreement in the scientific integrity issue and investigation that was ongoing is unrelated to the issue of the trap and relocate methodology. There was no disagreement and is no disagreement within the Service about the science on that. The State has requested that we revise the recovery plan. We will open discussions with the State about that. Of course, going back to Senator Udall's question about the sequester, we are an organization under severe stress and have lots of people that want us to do lots of things. I think that is a significant challenge that we will need to talk about, how to resource that effort.

I think that as regards advice, in the meantime, about the American Bearing Beetle, we have to advise avoidance. And trap and relocate is a method to avoid and minimize take of Bearing Beetle, but it is not an authorization for take. So I think we need to continue to work with industry, I think we are, and we produced a conservation plan for the southern segment of the Keystone Pipeline in record time. So I think we will make a commitment to continue working on that issue. But we are where we are right now.

Senator INHOFE. I appreciate that very much. Very good answer.

Madam Chair, my time has expired, but rather than get into any questions, Ms. Sutley, I would like just to ask if you could respond to my letter, page 2, letter of August 14th. List three specific areas of questions, I would appreciate a response. Will you do that?

Ms. SUTLEY. Senator, we responded to your letter of August 14th on September 6th.

Senator INHOFE. Well, you didn't specifically respond to the questions. It was a generalist thing saying, no, we did not organize that particular event. That is not what I asked. If you just don't mind personally reading these three specific questions and trying to respond to them, could you do that?

Ms. SUTLEY. Yes, Senator. We are also in receipt of your letter of September 13th, and we will provide a response.

Senator INHOFE. Thank you very much.

Senator BOXER. So now we are going to go to Senator Cardin, if he is ready, or Senator Whitehouse. Senator Whitehouse.

Senator WHITEHOUSE. Thank you.

Let me ask Ms. Sutley, in your role at CEQ, overseeing NEPA throughout all the various Federal agencies, can you identify provisions that were included in MAP-21 that would be helpful or useful for other types of Federal programs, like water projects or energy siting, or any cautionary tales that you would offer us about replicating the NEPA provisions for MAP-21?

Ms. SUTLEY. Thank you, Senator Whitehouse. There certainly are principles that are embodied in MAP-21 which we think are very useful in terms of encouraging up-front collaboration and coordination among the agencies, and looking at programmatic issues. We believe that under NEPA those are very effective tools for ensuring that we are getting through the environmental reviews thoroughly and quickly.

As we discussed, I think we have some concerns about the role of penalties and arbitrary deadlines that appear in MAP-21. I think based on our experience of over 40 years with NEPA, these are very different projects, and they have different characteristics. We are not convinced that one size fits all—things that may work in a transportation context don't necessarily work in other contexts. We have been working very closely with our colleagues across the Administration under the President's direction to look at how we do infrastructure permitting to employ methods that we know work, to look at specific projects as well as categories of projects to try to apply some of those principles. So we believe we are making a lot of progress there. Thank you, Senator.

Senator WHITEHOUSE. OK, thank you.

Madam Chair, let me make a point for the hearing here, which is that while I am no fan of bureaucratic of any name, nature or kind, the experience that I have in Rhode Island is not that NEPA is a barrier to getting infrastructure projects done, it is the Congress that is a barrier to getting infrastructure projects done, because we won't fund infrastructure projects. And I think the lion's share of the blame for that goes to the other side of this building, to the House of Representatives. I note that we passed a bipartisan, comprehensive transportation spending bill and the House can't manage that. They can't legislate, it doesn't seem, on anything except to repeal Obamacare 40-plus times.

So one example, we just got the Apponaug Circulator in Rhode Island, \$10 million through a TIGER grant, that has been waiting with its NEPA no significant impact approval for nearly a decade now. So it is important, I think, that voices in Congress that are

saying, oh, it is this environmental protection problem that is fouling up our infrastructure, we have to look at ourselves. It is Congress' failure to pass infrastructure funding. The House hasn't passed our WRDA bill, which came out of here with strong bipartisan support. The House hasn't passed the transportation bill. These are not complicated, ideologically divisive, confrontational type issues.

We can always pass highway bills. We can always pass water bills. The problem is we have one body of Congress that has become thoroughly dysfunctional in the hands of its extremists and so the money isn't there. And that really is the battle that I think we need to put our focus on; how do we put the money behind infrastructure funding when our engineers give us a D for infrastructure, when everybody drives over bumpy roads and out of date bridges, when EPA says we have \$600 billion in water infrastructure deficit that we need to catch up with for the sake of our national water infrastructure?

Please, let's focus on where the problem really is, which is Congress and Congress refusing to fund American infrastructure. That is the real problem, in my view. Thank you, Chairman.

Senator BOXER. Thank you very much.

Senator Cardin.

Senator CARDIN. Thank you, Madam Chair. I thank you very much, and we know you are trying to get the balance right between timely delivery of projects and public expectation, and making sure we get it right.

So I want to start off by giving an example of how I think we got it right because of NEPA. It involves, in my State, the CSX terminal, regional terminal. Now, there was a strong likelihood that that terminal would have been located in Elkridge, Maryland, because that was the preferred site. And what concerns me, it was the wrong site. It was the wrong site and the community had an opportunity under NEPA to make that case.

But I can assure you that under the procedures that are contemplated under MAP-21, that would have been in jeopardy. Because there was a lot of political forces moving toward Elkridge. And there weren't alternatives at that time available that would have worked.

But because of the NEPA process, because we got involved in it, yes, the politicians did get involved in the process, there was an opportunity to point out that there was a site that was even better in the southern part of Baltimore that would work, that was an industrial area rather than a community area. At the end of the day, it was more cost-effective, efficient, to locate it there, and the process worked and everyone is happy.

So I guess my concern and my question is, how do we ensure under the procedures that are included in MAP-21 that communities will have adequate input into the process? Do we run a risk that because deadlines become so consequential, and are determined outside of a negotiated process that takes into consideration the complexity of projects, do we run a risk that we are really shutting out communities and the public from comment under these new procedures? How do we try and make sure that doesn't happen? Secretary Porcari, you are very familiar with this one.

Mr. PORCARI. I am, Senator. Thank you for your leadership on it. As you point out, I think we ended up with a great outcome.

The two things that you mention are not irreconcilable of a faster, more predictable process. But also measurably better outcomes. And those outcomes can be measured in environmental terms, but also community and other terms as well. In that specific example, there were very significant environmental issues and impacts from the proposed site. By frontloading the process, one of the things we are trying to do together is make sure that the stakeholders, rather than in a sequential way, are involved from the beginning. That includes communities. And having them involved earlier in the process gives them a voice earlier in the process, where all of the different issues can actually be weighed and evaluated and everybody with an equity in that project can be represented. We think there are significant opportunities for these better outcomes through this re-engineered process.

We all need to be mindful what communities value and what the environmental values of a project are important considerations that have to be baked in from the beginning.

Senator CARDIN. I would just challenge one statement. You are familiar, I am familiar with this project. It was going to be in Elkridge. And the timeframe would have been geared toward an Elkridge decision.

But for the process, and we slowed it down a little bit, we got the right outcome, we did get the right outcome here?

Mr. PORCARI. We did get the right outcome.

Senator CARDIN. How do we ensure, in the re-engineered process, that we are going to be able to get the right outcome?

Mr. PORCARI. The frontloading, from my perspective, also includes making sure elected officials are involved.

Senator CARDIN. Now you are stretching the ability here. We would like to be involved more.

Mr. PORCARI. Senator, if you go with the alternative, which is what has typically happened in the past, and elected official involvement is toward the end of the process, then you have often down-selected alternatives.

Senator CARDIN. I want to give Director Ashe a chance to reply; he looks anxious to reply.

Mr. ASHE. Excuse me for that.

[Laughter.]

Mr. ASHE. I would just say, I think your basic premise is right. I think we have been talking about that here today, that with good coordination, good communication of expectations with regard to deadlines, all good things. I guess my rebuttal to that is, can you have too much of a good thing, meaning too harsh of a deadline, where a good transparency is lost, public then loses the ability to understand and participate in a process, I think you can.

Those are the cases we are oftentimes aware of, the environment and natural resources suffer the consequences of that. In the long run, communities suffer the consequence of that.

Senator CARDIN. Thank you both. I appreciate it very much.

Senator BOXER. Senator Fischer, I apologize. I skipped over you. Please go ahead.

Senator FISCHER. Thank you, Madam Chair. I am tucked over here on the end, so I appreciate your recognizing me. And I do appreciate your comments earlier when you were questioning. I think it was right on target.

Mr. Porcari, our concern, I think, is with the limited resources that we have, and especially at the State level, in a big State like Nebraska that has a lot of roads and a lot of bridges. How are we going to follow a process and really receive some outcome-focused results that meet the environmental concerns, that address the social benefits as well, when there is so much paperwork? I have a copy here of a CE from the Department of Roads. It is 20 pages long, on both sides. It was for less than 5 miles, a 3R project, less than 5 miles between two very rural communities in the State of Nebraska, one a population of 577, the other a population of 57. Very sparsely populated area. Took a lot of time, 10 months. Took a lot of resources, took a lot of money.

How are we going to speed that process up and use really some common sense, where the impacts aren't going to be that great? Of course we want community involvement. But a lot of this, it is just paperwork. It is for resurfacing. These are projects we see in the rural areas again and again and again. And the impacts aren't there, that we've heard from some of the other members of this Committee.

So how are we going to address projects that need to happen where there aren't that great of concerns with?

Mr. PORCARI. It is a very good question, Senator, and I think the answer is two-fold. First, on projects that are, for example, state of good repair projects, where you are resurfacing or doing something, that don't currently qualify for categorical exclusions, and there are some of those, we think broader use of categorical exclusions helps. Then to your specific question, within projects that currently qualify for categorical exclusions, how can we streamline the process. Governor Heineman commented on that with Secretary Foxx at the National Governors Association. It is something that we are working on right now in our MAP-21 implementation and rulemaking process. We are actually looking at the stakeholder input on that right now. We have a variety of people that have weighed in on every side of that issue. But we believe even within existing categorical exclusions, the process itself can be easier. And we are looking for early wins on that.

Senator FISCHER. I would hope so. Even when you have a minor change to a project, to have to start all over again, whether you are changing a culvert or whatever, don't you think that is kind of ridiculous?

Mr. PORCARI. Well, there are thresholds below which it doesn't constitute a major change. As you point out, the application of common sense is important in this process. We think that we can do that. And we think that with the input of the States, we are prioritizing that right now.

Senator FISCHER. Thank you very much. I appreciate that.

Thank you, Madam Chair.

Senator BOXER. Thank you so much.

Senator Barrasso.

Senator BARRASSO. Thank you, Madam Chairman.

I would like to follow up with Senator Fischer's question. While she was in the Nebraska legislature, I served time in the Wyoming legislature. Both of us chaired our State's transportation committees. So these are issues that people deal with at home, are familiar with.

And just along those lines, both to Mr. Porcari as well as to Mr. Come, the GAO says on average it takes the Federal Government 4 years to complete the Federal rulemaking process. They also found that it took the Federal Highway Administration and the Federal Transit Authority an average of 5 years to complete the rulemaking process. So MAP-21 is going to expire next year, and it is very unlikely that the bill would be fully implemented by the time that it expires.

What are your views, as we try to draft another reauthorization bill before the current bill has even been fully implemented?

Mr. PORCARI. First, Senator, we will continue to share feedback with the Committee on what our progress is and what some of the issues are that have come up. I testified earlier that there are likely to be between 50 to 60 rulemakings embedded within MAP-21, which is a very large number. It is very difficult to do in a 2-year timeframe.

And as you pointed out, the rulemaking process has substantial input opportunities for public input. And it tends to be a long process.

What we have done as a result is prioritize. And we are working, completing and working on the MAP-21 requirements that we think we get the most efficiency gains the quickest for. So we will continue to work through the list, we think that there are some early wins, some of which you have already seen, others imminent. And we are very mindful that a surface transportation reauthorization is right around the corner.

Senator BARRASSO. Mr. Come.

Mr. COME. Our observation on that, and it is a more practical suggestion than a profound one, was that establishing milestone dates, conclusion dates for as many actions as possible, would help expedite the process as well as providing useful information for the stakeholders. I was happy to hear from the Department that they are in the process of developing those for all the Subtitle C provisions.

Senator BARRASSO. For my friend Dan Ashe as well as for Mr. Porcari, if I could. With the U.S. Fish and Wildlife Service's potential September 2015 listing determination of the sage grouse under the Endangered Species Act, it is a serious concern, certainly in my home State of Wyoming, but the potential habitat, if listed, would cover most of Wyoming, most of Idaho, most of Montana, most of Nevada and parts of Oregon and Colorado. Sage grouse is a sagebrush dependent species. Most roads in my State have sagebrush on either side of the road.

So I am just wondering how the project streamlining gains that we have made with MAP-21 would be impacted by such a listing in terms of expediting highway projects, such as repaving highways, expanding highway capacity, improving safety measures on highways and so on.

Mr. ASHE. Should sage grouse be listed, and as you know, Senator Barrasso, we have all 11 States, the Bureau of Land Management, the Forest Service, the Natural Resource Conservation Service, all working on comprehensive strategy to conserve the sage grouse. So we have yet to certainly make that decision, and we have a good amount of time yet to make that decision.

But if it were listed, I think we have processes in place, and I think our record on consultation on highway projects is very good, and we have a very good relationship with the Department of Transportation. As Deputy Secretary Porcari referenced earlier, we have recently developed a multi-State habitat conservation plan with regard to the Indiana bat.

So I would say that I think we have a very good track record and we will make it work.

Senator BARRASSO. Thanks. Mr. Porcari.

Mr. PORCARI. Just to echo Director Ashe's comments, we have a very good working relationship, and should the sage grouse be listed, the first thing we would look to do is work out a programmatic agreement with U.S. Fish and Wildlife. So on a corridor-wide basis, projects could proceed and it would better protect some resources as well.

Senator BARRASSO. Thanks. A final question, Ms. Sutley. The White House CEQ announced draft guidance for greenhouse gas emissions and climate change impacts back in February 2010. In your opinion, to what degree would incorporating climate change in NEPA work against some of the streamlining gains that have been achieved by MAP-21?

Ms. SUTLEY. Senator, thank you for that question. We don't believe that that kind of guidance would have any particular impact on streamlining. We believe that greenhouse gases, as other environmental effects, are things that agencies should consider as they look at the proposed actions.

But I think as for any environmental effect, it really has to do with the significance of the Federal action and the significance of those environmental effects associated with it. We believe that guidance would help agencies to sort of tailor their reviews to the appropriate scale.

Senator BARRASSO. Thank you. Thank you, Madam Chair.

Senator BOXER. Thank you.

Before I start my questions, I want to give you a chance, Ms. Sutley. My understanding after reading your letter, your response to Senator Inhofe, is that you were there on official business and there were Governors and Congress people there as well. Is that correct?

Ms. SUTLEY. Thank you, Senator. Yes. That was correct, in fact, Senator Whitehouse joined us at one of the events. So it was official business to discuss the Administration's priorities on climate change.

Senator BOXER. I wanted to make sure you had an opportunity.

Ms. SUTLEY. Thank you, Senator.

Senator WHITEHOUSE. If I might, because you mentioned Rhode Island and me?

Senator BOXER. Absolutely.

Senator WHITEHOUSE. This was about as non-secrective as possible. We had press conferences, we were delighted that Chair Sutley was able to come. It was a great opportunity. Governor Chafee, who used to serve on this Committee, was an important part of the group that was present. I hope that she will come again.

Senator BOXER. Excellent. So we will tell Senator Inhofe that we pursued this and send him the record.

First of all, I would say, Ms. Sutley, I thought your comments were very productive today. I think you recognized what we have done in these reforms, something that has not been done before. And there is misunderstanding, and there are reasons for it, because people didn't read it. This reform, which is so important that I would like to extend it as far as I can, says that there can be no arbitrary deadline set. The deadlines are set by the agencies involved. It is not just about environmental agencies, Senator Whitehouse. I know you were mentioning it, but I agree with this, mostly the problem is with the funding.

What we are saying, when the deadlines are set, the following agencies must agree to the deadlines: EPA, Corps of Engineers, Fish and Wildlife Service, NOAA, Department of Transportation. That is the law. And there is no deadline set unless there is an agreement.

Mr. Ashe, did you read Section 1305 of this law? Shall we send it to you?

Mr. ASHE. I have read the law. I know that in the particular instance of MAP-21, the implementing guidelines tell us that we have 180 days from the date that we receive a Section 7 consultation. We have up until the record of decision is made and 180 days after that. We don't get to negotiate that deadline.

Senator BOXER. Mr. Ashe, you do not understand the law. I am so frustrated. Because you set the deadline with Mr. Porcari. You set the deadline with the court. There is no deadline set until you agree. It is there. It says, the concurrence of your agency. Read Section 1305. Because everything you are saying here is based on the fact, this woe is me, I am not consulted, and then you go on to say, I am just going to say no. That is a very strange thing to say to the American people, when our President has said, we want to work together. We are not going to stamp our feet and say no. The reason we got an agreement is, we all fought for our position. I can guarantee you there are people in that room who wanted to give DOT sole authority to set a date, and we said, that is not how it is going to work. Read Section 1305.

I believe this is much ado about something good.

Mr. ASHE. Chairman Boxer.

Senator BOXER. Yes, go ahead.

Mr. ASHE. I think that we are making it work, and I think that is the message that you have heard here today. We are making it work without penalty provisions.

Senator BOXER. I didn't hear that from you. What I heard from you is a complaint about the deadline and then the fine. And misunderstanding is what I heard from you.

Mr. ASHE. You definitely heard from me—

Senator BOXER. Let me finish, please.

You didn't seem to know, I have a lot invested in this. I have 100 percent environmental record, OK? So please let me finish. And I will stop legislation that hurts our people and hurts our environment. And I will tell you that this provision is amazingly good for this reason. It gets you in the room with the EPA, with the Department of Transportation, with the Corps of Engineers that you are often in contention with, and rightly so. It puts you in the room with NOAA. And you have to set the deadline. Read Section 1305. We changed the law. Before DOT set the deadline without the concurrence of these agencies, it was just consultation. We changed it, concurrence of your agency.

So we have set up a process where you have the power. I don't think, frankly, maybe I am wrong, that you completely understood it. Because if you did understand it, you wouldn't have said, and we are just going to say no, take our marbles and walk out the door. That is not what we want to hear. Let me say, it is not what I want to hear.

I want you to be in the room. I supported you. I want you in the room when deadline are set.

Now, the other thing you didn't seem to be so aware of is what it takes to extend the deadline. Before any penalty kicks in, if there is any information that hasn't been received by the agency, any necessary information, if there are approvals lacking from any entity such as the project sponsor in a manner that affects the ability of the agency to meet any requirements under State or local or Federal law, if there is significant new information, which reaches to Senator Whitehouse's very important point. It is significant new information if Congress isn't funding a project.

There is no deadline and there is no fines. If there is a major modification to an aspect of the project, there is no deadline, there is no fine. Or if there is additional analysis needed for the agency to make a decision.

So to sit there and say, in the face of the fact that you have been given more power than you have ever had before to be in the room and set the deadline, and then more power to talk to Mr. Porcari and say, you know what, we haven't received the information, don't hold us to this, of course you will get an extension.

So I guess, what I am saying to you, from the bottom of my heart, is please re-read this law. Please re-read this reform. I believe you will come to the conclusion that you have more power than you have ever had before to be in the room and to stay in the room and to have a major impact. Because frankly, if that wasn't the case, to me it wouldn't have been worth pursuing this reform.

So will you promise me, and let's talk more about this. This is not a happy moment for me. Could you take another look at the law with your attorneys? If they disagree with me, I would like to sit down and talk with you and then with my chief counsel, Bettina. Can we do that?

Mr. ASHE. We can do that.

Senator BOXER. Thank you so much. It would mean a lot to me if we could do that.

Senator Whitehouse, do you have anything? OK. I want to thank everybody for being here. This is a very important moment for us. The President has said what he wants to do, he wants to make

sure we move and speed ahead with all the right protections. All the right protections. That is my interpretation of what we have done. And I want to thank Senator Udall, he has concerns and he is going to be a tiger watching what happens. We are going to be watching you, those of us who support these reforms, are going to be watching you, Mr. Porcari. And I heard in your voice, it sounds like maybe you don't have enough folks to put on this, but do you have enough people in there in place to carry these reforms out?

Mr. PORCARI. Chairman Boxer, this is a priority. We will carry it out. And I will tell you, this is something that many of us feel personally very strongly about, because we can do both a better job of environmental and community protection and have better process at the same time.

Senator BOXER. That is how I feel. If I didn't feel that way, I wouldn't have supported the reforms.

And Mr. Come, may I just thank you very much. Because I think what you have done, you have been an honest messenger. You have said, they have done right here, but they are lagging here. I hope the two of you will work together. And Mr. Ashe, I hope that after looking at all of this, you will feel better about what we have done and not be nervous about it and have a very positive attitude.

And Ms. Sutley, I am sorry that you got attacked on something extraneous, but I think you answered it well. Thank you. We stand adjourned.

[Whereupon, at 11:38 a.m., the Committee was adjourned.]

[An additional document submitted for the record follows:]

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Carbon Dioxide Level Passes Long-Fearred Milestone - NYTimes.com

**The New York Times**

May 10, 2013

## **Heat-Trapping Gas Passes Milestone, Raising Fears**

By JUSTIN GILLIS

The level of the most important heat-trapping gas in the atmosphere, carbon dioxide, has passed a long-feared milestone, scientists reported Friday, reaching a concentration not seen on the earth for millions of years.

Scientific instruments showed that the gas had reached an average daily level above 400 parts per million — just an odometer moment in one sense, but also a sobering reminder that decades of efforts to bring human-produced emissions under control are faltering.

The best available evidence suggests the amount of the gas in the air has not been this high for at least three million years, before humans evolved, and scientists believe the rise portends large changes in the climate and the level of the sea.

"It symbolizes that so far we have failed miserably in tackling this problem," said Pieter P. Tans, who runs the monitoring program at the National Oceanic and Atmospheric Administration that reported the new reading.

Ralph Keeling, who runs another monitoring program at the Scripps Institution of Oceanography in San Diego, said a continuing rise could be catastrophic. "It means we are quickly losing the possibility of keeping the climate below what people thought were possibly tolerable thresholds," he said.

Virtually every automobile ride, every plane trip and, in most places, every flip of a light switch adds carbon dioxide to the air, and relatively little money is being spent to find and deploy alternative technologies.

China is now the largest emitter, but Americans have been consuming fossil fuels extensively for far longer, and experts say the United States is more responsible than any other nation for the high level.

The new measurement came from analyzers atop Mauna Loa, the volcano on the island of Hawaii that has long been ground zero for monitoring the worldwide trend on atmospheric CO<sub>2</sub>. Devices there sample clean, crisp air that has blown thousands of miles across the Pacific Ocean, producing a record of rising carbon dioxide levels that has been closely

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century.

Carbon dioxide above 400 parts per million was first seen in the Arctic last year, and had also spiked above that level in hourly readings at Mauna Loa.

But the average reading for an entire day surpassed that level at Mauna Loa for the first time in the 24 hours that ended at 8 p.m. Eastern Daylight Time on Thursday. The two monitoring programs use slightly different protocols; NOAA reported an average for the period of 400.03 parts per million, while Scripps reported 400.08.

Carbon dioxide rises and falls on a seasonal cycle, and the level will dip below 400 this summer as leaf growth in the Northern Hemisphere pulls about 10 billion tons of carbon out of the air. But experts say that will be a brief reprieve — the moment is approaching when no measurement of the ambient air anywhere on earth, in any season, will produce a reading below 400.

"It feels like the inevitable march toward disaster," said Maureen E. Raymo, a scientist at the Lamont-Doherty Earth Observatory, a unit of Columbia University.

From studying air bubbles trapped in Antarctic ice, scientists know that going back 800,000 years, the carbon dioxide level oscillated in a tight band, from about 180 parts per million in the depths of ice ages to about 280 during the warm periods between. The evidence shows that global temperatures and CO<sub>2</sub> levels are tightly linked.

For the entire period of human civilization, roughly 8,000 years, the carbon dioxide level was relatively stable near that upper bound. But the burning of fossil fuels has caused a 41 percent increase in the heat-trapping gas since the Industrial Revolution, a mere geological instant, and scientists say the climate is beginning to react, though they expect far larger changes in the future.

Indirect measurements suggest that the last time the carbon dioxide level was this high was at least three million years ago, during an epoch called the Pliocene. Geological research shows that the climate then was far warmer than today, the world's ice caps were smaller, and the sea level might have been as much as 60 or 80 feet higher.

Experts fear that humanity may be precipitating a return to such conditions — except this time, billions of people are in harm's way.

"It takes a long time to melt ice, but we're doing it," Dr. Keeling said. "It's scary."

Dr. Keeling's father, Charles David Keeling, began carbon dioxide measurements on Mauna Loa

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and at other locations in the late 1950s. The elder Dr. Keeling found a level in the air then of about 315 parts per million — meaning that if a person had filled a million quart jars with air, about 315 quart jars of carbon dioxide would have been mixed in.

His analysis revealed a relentless, long-term increase superimposed on the seasonal cycle, a trend that was dubbed the Keeling Curve.

Countries have adopted an official target to limit the damage from global warming, with 450 parts per million seen as the maximum level compatible with that goal. “Unless things slow down, we’ll probably get there in well under 25 years,” Ralph Keeling said.

Yet many countries, including China and the United States, have refused to adopt binding national targets. Scientists say that unless far greater efforts are made soon, the goal of limiting the warming will become impossible without severe economic disruption.

“If you start turning the Titanic long before you hit the iceberg, you can go clear without even spilling a drink of a passenger on deck,” said Richard B. Alley, a climate scientist at Pennsylvania State University. “If you wait until you’re really close, spilling a lot of drinks is the best you can hope for.”

Climate-change contrarians, who have little scientific credibility but are politically influential in Washington, point out that carbon dioxide represents only a tiny fraction of the air — as of Thursday’s reading, exactly 0.04 percent. “The CO<sub>2</sub> levels in the atmosphere are rather undramatic,” a Republican congressman from California, Dana Rohrabacher, said in a Congressional hearing several years ago.

But climate scientists reject that argument, saying it is like claiming that a tiny bit of arsenic or cobra venom cannot have much effect. Research shows that even at such low levels, carbon dioxide is potent at trapping heat near the surface of the earth.

“If you’re looking to stave off climate perturbations that I don’t believe our culture is ready to adapt to, then significant reductions in CO<sub>2</sub> emissions have to occur right away,” said Mark Pagani, a Yale geochemist who studies climates of the past. “I feel like the time to do something was yesterday.”

*This article has been revised to reflect the following correction:*

**Correction: May 10, 2013**

An earlier version of this article misstated the amount of carbon dioxide in the air as of Thursday’s reading from monitors. It is .04 percent, not .0004 percent.

[www.nytimes.com/2013/05/11/science/earth/carbon-dioxide-level-passes-long-feared-milestone.html?pagewanted=all&\\_r=1&pageanted=print](http://www.nytimes.com/2013/05/11/science/earth/carbon-dioxide-level-passes-long-feared-milestone.html?pagewanted=all&_r=1&pageanted=print)

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